Prosecuted Ted Bundy

Jerry Blair → 2:15–3:45 2/26

1/2/79 - took office →
before that in private practice
and part-time asst SA ...

I don't think most ppl in
law school give much thought to
pros or Δ criminals -

At UF like most law
schools, sort of look down on
criminal law - I expected to
come out & do respectable law -
probate or something ...

Started in a large practice -
then went into practice w/ a partner.
Arthur Lawrence, the SA, approached
me to p-time pros ...

Needed income - liked pros. -
I cld-'t picture being a Δ atty ...
2 of our Circuit judges had
been indicted - SA ran for one of
those - I was naive enuf to listen
to ppl telling me to run ....

3-man team on Bundy — Bob Dekle & I both knew we were running ag'st each other when Kim Leaches body was found

Bob assigned — I thot might be the end of my pol. career — knew w'ld be a big forum for him ...

Bob stayed on for B. case — & 12½ yrs later, he's still here...

I had tried one previous Capital Case — the first one I ever saw, I pros'd — Larry Joe Johnson — murder in Madison Cnty — Dec. of 1979 ... Bundy to trial Feb. of 1980 ...

Phil, always supported DP but not much of an issue while in law school ... not really a burning issue ... SC had squelched, effectively ...

Spenk's execution — one of the reax to that was an abortive plea bargain on Bundy ... we were contacted by B. attys abt taking a plea ē exchange for 3 consec. lifes — we contacted Leach family, all the l.e. ppl.. agreed cld live w/ that ...

We were concerned abt things he sed wld raise questions of comp of counsel ...

Had his signature before he pulled the rug out ...

We started — ~~[illegible]~~ Nov. '79 — trying to pick a jury in Live Oak — cldn't get a jury — moved to Orlando.. Suwannee Cnty — "by & large a pretty good place to pros. a case."

I anticipated that B. wld prolly be more demonstrative — take more a role in his Δ — he did'nt do that → felt it wld be extensively covered ... scrutinized

Media – you end up litigating on more fronts because of access → unfortunately we were dealing w/ a cause celebre before he ever hit Fla. → didn't realize until day we found Kim Leach's body – I was last in office & answered fone calls from Wash, Oregon, Colo, Utah → no idea of the intense media interest → began to get some inkling →

We saw it as dp from Day One – when you have a well-pub'd dp case – can expect very intense scrutiny...

I don't think any of us imagined back in 1980 – w/ Spenk having been exec'd – we were naive enuf to believe Sp. wld mark beginning of exec as routine →

I wld've predicted sev. yrs of protracted litigation – not 11 yrs...

I wld hesitate to call it a hurry-up schedule → but I've made the pt that a lot of ppl up there who, procedurally, shld've been exec'd before TBundy ...

Clear a couple of govs did everything in their pwr to expedite the Bundy execution — not saying for polit ends, but how that result — keeps moving thru the system ...

#

AG the appellate lawyers — & we're the trial lawyers — but still a great deal of work → at trial ct level of appeals we are present — not at appellate level ...

Cost → I think what we're seeing — nationally & Florida — we're now in a climate where 80% of ppl favor dp ... opponents can't wage philos. battle any more, so trying to flank them w/ the conservatives by appealing to cost

Gonna have most of these costs in any 1° degree case ... & ultimately prolly saves resources — it's our only deterrent to going to trial in 1st degree

You have fewer trials bec. of threat of dp ... & everyone has right of appeal ... you wld have just as many appeals ...

1st degree murder will always be treated seriously — will always have 25 yrs at least to sit over there & file motions..

DP means fewer 1° murder trials ...

We had some unique issues — hypnosis — thank God FSC made that prospective ... but having a ~~jury~~ verdict rev'd on appeal wld not have been near the catastrophe as aquittal

I was, I believe, the first contacted by John Tanner - I was not remotely interested in anything to delay - any ploy

I certainly don't question John Tanner - I think John was acting in purest of motives - but B. wasn't

Came clear to me when we met in Feb after Quantico - talking to ppl other States ... as I listened to investigators, listened to the tapes - became clear to me B. was playing →

* ~~He~~ He was tantalizing them, but whenever he got to specifics - wld refuse to respond to direct ~~questions~~ - always "I don't have enuf time... I need more time" - ask them to put pressure on their gov to contact Martinez ...

I thot it was more imp. for crim. justice system to be brought to justice than for TB to provide some details of crimes never be brought to justice

* Even if he was acting in complete sincerity ... I sensed tremendous lack of faith in crim justice system ... needed to restore faith ...

* I was tired of hearing ppl saying "TB is too smart. TB will never be executed." — Pros. are down there where rubber ~~mee~~ meets road ... insulting to me, AG, all appellate lawyers → but to say "He's so cunning he'll beat you all"

He was a good advocate ... had the potential to have been a very good atty ... but he wasn't a genius ...

John had only been in office 2 or 3 weeks – I didn't know him – I knew of him from press accts of heat he took for being TB's prayer partner... I share – John sincerely felt he had led TB to a conversion...

Down in Orlando became aware TB receiving a number of visits → & this female lawyer...

The intense adulation of women for Bundy → we had a woman who drove over from Jax every day – insist on staying in front row – "The Lady in Black" – She almost got in a fight w/ Carole Boone in Orlando...

A lot of ppl – that ctrm in Orlando not there to see him convicted → I recall one day coming back from lunch chatting w/ some spectators, became clear I was not in the white hat...

I witnessed execution of RAS →
I felt very strongly that if I was going to stand up & asked a jury to rec & a judge to impose, I needed to be very sure just how strongly I supported the dp – if gonna ask for it, ought to see it thru...

What I realized coming out of RAS was witnessing an exec. not likely to change one's views abt it... knew nothing abt RAS until read up nite before → more gut-wrenching

I was, by chance, front and center at both – when I sat down at RAS – in front of Old Sparky – so close – if any was cld've exited gracefully, wld've ... so close...

Bundy exec.

He acknowledged Lawrence, Coleman – moved w/ eyes down row – saw me, mouthed something – I nodded...

At that pt in time I felt TB had prolly made a genuine relig- conversion - no reason to think otherwise → seemed at peace w/ maker, a serenity ... I didn't see that in Sullivan ...

Expected him to make a more lengthy statement, something along lines of what he told Dobson ...

* After looking at the Dobson tape several times, & seeing the vintage Bundy at work there - then going up to Quantico ... felt perhaps just another ploy ...

I think came away from Quantico w/ pretty good sense of the numbers - states hadn't realized before - graphic details ...

America's Jack the Ripper - I'm a county prosecutor, by happenstance TB arrived in my county → purely professionally, very fortunate - I was involved in a case going to be remembered & written abt ...

We went up to Quantico – Bob & I –
I guess kinda feeling we wld be
hailed as conquering heroes –
"Way to go!" – but actually
sensed a lot of resentment
from a lot of these ppl whose
lives had ~~[illegible]~~ revolved around
him – were gonna have to go
out & find something new...

→ Wld a been political suicide... (to give
him time)...

After exec: "My reax was mixed – felt
sense of relief, satisfaction →
system had wkd – not perfectly,
not quickly, but had wkd...

"~~Also~~ – a little like those investigs
out West – part of me didn't
want it to end – a part of
my life 11 yrs – unpleasant
part many respects → but
a part"

"And a sense of it all such a
waste – Bundy's and all those
women – hit by the enormity
of the waste"...

The scene – "I don't like that – but it's understandable... Don't think sh'ld take any joy – but Bundy persinified all the frustrations abt crim justice System & our inabil to carry out the dp – as long as he lived & breathed it was a constant reminder..."

Blair - Sed if JB had been given more time, ppl x country wld've been upset - "multiply that ten times over to get flavor of ppl in Fla. ... & many, many times that to get flavor of ppl in these communities"

Justices challenge Bundy appeal for omitting death penalty

OCT 7 1982

By NEIL SKENE
St. Petersburg Times Staff Writer

Capital Punishment

TALLAHASSEE — Ted Bundy's lawyer had a dozen reasons why the Florida Supreme Court should overturn Bundy's conviction of double murder, but in 200 pages of briefs, he never argued that Bundy did not deserve the death penalty.

2 FLA

Wednesday the Supreme Court wanted to know why.

"Are you saying," Justice Joseph Boyd asked, "that if Mr. Bundy is guilty of murder in the first degree, electrocution is appropriate?"

"No, sir, I would never concede that, your honor," replied defense lawyer Robert A. Harper Jr.

Harper, a lawyer in Tallahassee, was at the court Wednesday for oral arguments in Bundy's appeal of his conviction of murdering two young women from St. Petersburg — Lisa Levy, 20, and Margaret Bowman, 21 — as they slept in the Chi Omega sorority house at Florida State University. (His conviction of murdering a 12-year-old girl from Lake City will be considered in a separate appeal.)

AS HARPER concluded his argument, Chief Justice James E. Alderman pointed out Harper's concentration on whether the trial was fair without mentioning whether Bundy, once convicted, should be executed. "Was that intentional?" Alderman asked.

"It was intentional — hopefully not ineffective," replied Harper.

But "ineffectiveness of counsel" was precisely what the justices were concerned about. "At some point somebody will

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See BUNDY, 10-B

Bundy from 1-B

be before us ... challenging *your* effectiveness," Alderman told Harper, "and I want it absolutely clear why you did not argue in your brief the appropriateness of the death penalty."

It was the third time in two months that lawyers for defendants sentenced to death had challenged trial procedures without challenging the death penalty. And, as Justice Ben Overton pointed out Wednesday, that omission has been used in other cases to seek last-minute stays of execution.

Harper never clearly explained his strategy except to express confidence that "the conviction in this case cannot stand." He said he was not trying to set aside the death issue "in order to bring it up later."

ALDERMAN GAVE Harper 20 days to file an argument on the propriety of the death sentence.

Lawyers for death row inmates usually don't take the gamble that Harper seemed to be taking. They usually tell the court why the conviction should be overturned but also state, in case those arguments fail, why the death penalty should not apply.

But the case against Theodore Bundy, a handsome, 35-year-old former law student, has not been your usual case.

To prove that bite marks on Lisa Levy's body were Bundy's, prosecutors obtained what was in effect a search warrant for Bundy's mouth so they could obtain a mold of Bundy's teeth. They also hypnotized Nita Neary, who had gotten a glimpse of the killer as he left the sorority house, in an effort to get a better description of the killer. And word of Bundy's arrest in Pensacola in February 1978 brought so many reporters to town that an investigator said the initial press conference should have been held in an auditorium.

The bite marks and the hypnosis, Harper said, make the case "a landmark in legal history."

THE ARGUMENTS drew a crowd to the Supreme Court's tall, Manila-and-white courtroom. The pews were filled, and about four dozen people stood against the walls. The justices in their black robes sat in their executive chairs at their elevated bench. The defense lawyers even brought with them a black, four-drawer file cabinet, which stood next to the defense table.

The lawyers were a contrast. Harper, stocky and bearded with straight black hair, wore a suit of gray. Assistant Attorney General David Gauldin, the lawyer for the state, had wavy, windblown blond hair and a light mustache, and he wore a blue-checked sport coat and white trousers.

For all of the anticipation the arguments themselves lacked the pizazz of a landmark case. There were few rhetorical flourishes, and the lawyers dwelled on details rather than the deep questions of law and policy that often dominate Supreme Court arguments. The justices' questions rarely bore in on the precise rules on bite mark evidence and hypnosis that could make this case something of a landmark.

Harper said the bite mark evidence was too unreliable to be admissible against Bundy, particularly since the state's main expert was a doctor "out to get famous on this case." And the hypnotist had pressed Nita Neary on details that she said she had not seen. "You can see that a creation of memory occurred," said Harper, and it made Miss Neary's identification of Bundy as the killer "inherently unreliable."

GAULDIN ARGUED that, with expert witnesses on both sides, jurors had been able to weigh the shortcomings of such evidence in reaching their verdict.

Gauldin scoffed at Harper's claims that Bundy had not had effective assistance of counsel at his trial. Bundy himself was an "armchair general," dictating strategy to an "army" of lawyers, Gauldin said. "There's one lawyer in the world he didn't have — the one that he wanted, Millard Farmer (a flamboyant lawyer from Atlanta). God knows why he wanted him."

Gauldin also scoffed at Harper's argument that local judges failed to control pretrial publicity and that it was wrong to move Bundy's trial from Tallahassee to Miami. "It was Mr. Bundy's motion that moved this trial," said Gauldin. As for the publicity, "let's face it: This was a somewhat notorious crime."

None of the justices gave any sign of embracing Harper's arguments. Harper rarely got friendly questions, while Gauldin got several. At least two justices praised the care exercised by Circuit Judge Edward Cowart in handling the trial.

But questions do not always indicate justices' true feelings, and it will probably be several months before they announce a decision.

11/14
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ON METAPHORS, MIRRORS, AND MURDERS: THEODORE BUNDY AND THE RULE OF LAW

by Michael Mello*

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* Associate Professor, Vermont Law School. B.A., 1979, Mary Washington College; J.D., 1982, University of Virginia. In the interest of full disclosure, I note that from 1983 to 1986 I worked as an assistant public defender in Florida (first at the office of the state Public Defender in West Palm Beach and later at the office of the Capital Collateral Representative in Tallahassee), where all of my clients were death row inmates. During 1987 and 1988 I was an associate with the law firm of Wilmer, Cutler & Pickering, the firm that represented Theodore Bundy in postconviction litigation. I presently represent three condemned inmates.

This article is dedicated to the memory of the late Judge Robert S. Vance, United States Court of Appeals for the Eleventh Circuit, for whom I clerked (1982 - 1983). Although we often disagreed about the appropriate role of the federal judiciary in reviewing state-imposed death sentences, Judge Vance always remained a mentor, teacher, and friend.

This project left me with many debts, which I gladly acknowledge. Laura Gillen and Judy Hilts typed endless drafts of the manuscript with diligence, patience, grace, and good humor. Susan Apel, Louis Bilionis, Faith Blake, Marie Deans, Donna Duffy, Stephen Dycus, Paul Ferber, Rebecca French, Joseph Giarratano, Karen Gottlieb, Barbara Junge, Kenneth Kreiling, Nancy Levit, Reed Loder, Heather McArn, Rick Melberth, Michael Millemann, Anthony Paredes, Michael Radelet, Jeffrey Robinson, Ruthann Robson, Elliot Scherker, Larry Spalding, Pamela Stephens, Margaret Vandiver, Joan Vogel, and Stephanie Willbanks read and commented helpfully on at least one draft of the manuscript. I am especially grateful to pro bono paralegals (and criminologists) Michael Radelet and Margaret Vandiver for sharing with me their notes and sometimes painful recollections of our conversations and other events during the final days of Theodore Bundy's life. Peter Hect and Carmela Miragula provided helpful research assistance.

I particularly thank Ruthann Robson for her insights into the race, sex/gender, and class implications of the article, as well as for her relentless insistence that I confront the article's political subtexts.

I owe an immeasurable debt to my colleague Susan Apel, who critiqued four drafts of this article, who lived through the Bundy experience with me, and whose intellectual camaraderie, friendship, and generosity during this and other undertakings cannot be captured by any metaphor.

(continued...)

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* (...continued)

An earlier version of this article was presented as a paper at the 88th Annual Meeting of the American Anthropological Association, on November 18, 1989, in Washington, D.C. The AAA discussion on my and other papers clarified for me several ideas contained in this article.

Any errors are mine.

I. Introduction

> The power of a metaphor is that it colors and controls our subsequent thinking about its subject[1]

Lawyers for condemned inmates sometimes take the view that we are litigating for the anthropologists, the sociologists and the historians, in addition to litigating for the courts.[2] This perspective helps to sustain one emotionally when the chances of success are small. Even though the inmate loses in the courts and the execution occurs, the litigation has still made a record for the future. Taken as a whole, these cases form a historical corpus of information about whom the state is killing and under what circumstances. And that corpus will survive.

Making a record -- or setting the record straight -- is one task of this article as well. The article tells my version of a story that you probably think you know already: the history of Theodore Robert Bundy's efforts to ward off the Florida executioner.[3] I want to record my thoughts while the memories are still fresh in my mind and while the anger is still sharp in my soul. This article's principal source is

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1. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371, 1383 (1987).

2. Mello, *Another Attorney for Life*, in *Facing the Death Penalty* 83 (M. Radelet ed. 1989).

3. I do not for a moment suggest that mine is the *only* or the most important account of Bundy's cases. Bundy's chief postconviction counsel, for example, has written of his experience as Bundy's lawyer. Coleman, *Litigating at the Speed of Light*, 16, Litigation: The Journal of the Section on Litigation, American Bar Ass'n 14 (Summer 1990). Telling the story from my perspective and in my own voice is all I can do in this article.

my own memory, supplemented where possible by public documents and secondary materials.

I write reluctantly. Too much has already been said about Theodore ("Ted") Bundy, the serial sexual murderer[4] suspected of raping and then killing dozens of young women during the 1970's.[5] The cottage industry of commentary on Bundy has generated six nonfiction books[6] (with at least one more reportedly in progress),[7]

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4. "Serial killer" refers to one who murders a number of people over a long period of time, as opposed to a "mass killer" who murders a number of people in a single crime. *See* D. Lunde, *Murder and Madness* 47 (1975).

5. In a February 1978 announcement adding Bundy to the FBI's list of the ten most wanted fugitives, the bureau stated that Bundy "is wanted for questioning in connection with thirty-six sexual slayings which began in California in 1969 and extended through the Pacific Northwest and into Utah and Colorado." R. Larsen, *Bundy: The Deliberate Stranger* 2 (1986).

6. E. Kendall, *The Phantom Prince: My Life With Ted Bundy* (1981); R. Larsen, *supra* note 4; A. Rule, *The Stranger Beside Me* (3rd ed. 1990); S. Michaud & H. Aynesworth, *The Only Living Witness* (1989 updated edition) [hereinafter "*Witness*"]; S. Michaud & H. Aynesworth, *Ted Bundy: Conversations With a Killer* (1989); S. Winn & D. Merrill, *Ted Bundy: The Killer Next Door* (1980). Michaud and Aynesworth, both journalists, conducted extensive tape-recorded interviews with Bundy; I consider their works relatively reliable, because they often quote Bundy in what purport to be his own words. Larsen's book, like Michaud's and Aynesworth's and Rule's, has been updated to include developments in Bundy's collateral litigation. The Winn and Merrill work is now 10 years old, has not been updated, and does not discuss many of the legal developments in Bundy's Florida cases relevant here. Kendall, who claimed to have been Bundy's "girlfriend" for six years, did not address Bundy's Florida legal proceedings; her book is therefore not illuminating for the purposes of this article.

These secondary sources from the popular press are cited with some skepticism. No book provides source notes or other verifiable documentation. Rule and Larsen, self-styled Bundy "friends," both were reporters who covered Bundy's Florida legal proceedings for their respective news organizations. Further, the Rule book has several obvious errors. For example, Robert Graham did not lose the

(continued...)

one fiction book[8] and countless in-depth magazine and newspaper articles,[9] as well as a television mini-series (starring Mark Harmon as Bundy) and media preoccupation at times comparable to coverage of the Olympics.[10] A psychiatrist wrote in September 1990, a year and a half after Bundy was executed, that "during the last annual meeting of the American Academy of Psychiatry and the Law, a panel on the topic of Ted Bundy clearly captured the most attention. An extra loudspeaker was hauled into the hotel corridor so that folks could listen to the

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6. (...continued)
1986 Florida gubernatorial election campaign (A. Rule, *supra* note 5, at 461), indeed he did not run -- to the contrary, he *won* his race to become United States Senator; the Florida Attorney General's office did not formally estimate that it cost $6 million to execute Bundy (A. Rule, *supra* note 5, at 470), *see infra* note 199; the Supreme Court did not deny certiorari review three weeks after the district court denied Bundy's first federal habeas corpus petition in 1987 (A. Rule, *supra* note 5, at 470), *see infra* notes 78-80 and accompanying text. These errors do not inspire confidence. Still, her mistakes are relatively minor. Most of Rule's narrative coincides with the occurrences as I understand them.

In any event, these various secondary sources are cited only when they confirm information based upon my recollection or personal knowledge.

7. S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 324.

8. C. Cline, *Missing Persons* (1981).

9. *E.g.*, Daly, *Murder! Did Ted Bundy Kill 36 Women and Will He Go Free?*, Rolling Stone, Dec. 14, 1978, at 58; Horwitz, *Ted Bundy: Portrait of a Killer*, Cosmopolitan, Nov. 1980, at 328; MacPherson, *The Roots of Evil*, Vanity Fair, May 1989, at 140; Nordheimer, *All American Boy on Trial*, N.Y. Times Magazine, Dec. 10, 1978.

10. R. Larsen, *supra* note 4, at 300-01 (describing the "media army" that covered Bundy's first Florida trial); S. Michaud & H. Aynesworth, *supra* note 5, at 4, 260-61; A. Rule, *supra* note 5, at 352.

proceedings. I was among them, straining to hear."[11] The Florida governor who signed Bundy's final death warrant used Bundy in his unsuccessful 1990 re-election campaign.[12]

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11. Lion, *Coming to Grips With Our Fascination With Serial Murderers*, Valley News [Vermont], Sept. 18, 1990, at 14.

12. The National Law Journal provided the most detailed description of former Governor Martinez's 1990 campaign ad featuring Bundy:

> A guard opens a prison door, walks through and slams it shut behind him. Cut to Florida's Republican Governor Bob Martinez sitting at his desk, looking severe. "One of the most serious things that I have to address everyday is the whole issue of the death penalty," Martinez says stiffly into the camera. The flag frames him in red, white and blue. A family photo is on the mantle. "I now have signed some 90 death warrants in the state of Florida," he proclaims. "Each one of those committed a heinous crime that I don't want to choose to describe to you." [The ad then switches to] footage of . . . Bundy . . . as a mob outside the prison gates chanted, "Burn, Bundy, Burn." [The ad then cuts to footage of Bundy during his trial] A vague smirk crosses Bundy's face. "I believe in the death penalty," Martinez says over Bundy's freeze-framed image. The camera moves in for a tight close-up of the governor at his desk. "I believe it's the proper penalty for one who has taken someone else's life," Martinez somberly concludes.

Guskind, *Hitting the Hot Button*, National L. J., Aug. 4, 1990; *see also* Balz, *New Campaign Ads: Grim Focus on Fear of Crime*, Wash. Post, March 4, 1990 (describing ad); Minzesheimer, *Campaign '90 Notebook*, Gannett News Service, March 5, 1990 (describing ad); *Ad Features Bundy*, Crain Communications, March 12, 1990 (describing ad); Spears, *Bob Graham criticizes ads for Martinez*, Tallahassee Democrat, Mar. 8, 1990; (in his reelection advertizing, Martinez "declare[d] his support for the death penalty in a 30 second TV spot that also shows a smirking Ted Bundy, who was electrocuted on Martinez's order"); *cf.* Edsall, *Racial Forces Battering Southern Democrats*, Wash. Post, June 25, 1990 ("Martinez has pulled out of a nose dive in his favorability ratings, particularly after the state executed serial murderer Theodore Bundy").

(continued...)

This text was written because the current record needs correction in at least two important respects. First, there is a widespread public perception that Bundy received what Margaret Jane Radin termed in another context super due process[13] (painstaking, deliberate, redundant judicial review of the legality of his convictions and sentences), and that such process identified and corrected any constitutional error in Bundy's cases. Second, there is a pervasive view that Bundy and his lawyers caused the 10-year "delay" (between imposition of sentence in 1979 and execution of sentence in 1989) by manipulating the legal system -- in particular by failing to initiate litigation in a timely manner.[14]

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12. (...continued)

The 1990 election was not the first time Bundy was used in state electoral politics. Bundy's "name -- *and* continuing survival -- [also had been] subjects raised often in the [1986] gubernatorial and attorney general races in Florida." A. Rule, *supra* note 5, at 460 (emphasis in original). According to press accounts, Bundy at one point sought a stay of execution in part based on his assertion that Governor (now United States Senator) Robert Graham scheduled Bundy's execution to enhance Graham's campaign for the Senate. *See* Hardy, *Bundy blames Graham for pending execution*, United Press Int'l, June 24, 1986 (Bundy's motion for postconviction relief claimed that "the governor's action in signing this [death] warrant can only be viewed as an attempt to profit politically from taking action against Mr. Bundy. . . "); *Bundy appeal goes to state Supreme Court*, United Press Int'l, June 26, 1986 (same).

13. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. Cal. L. Rev. 1143 (1980).

14. The three most strident and irresponsible -- because they should know better -- purveyors of this falsehood are G. Kendall Sharp (a federal district judge who heard Bundy's habeas cases), Robert Graham (former Florida governor and now United States senator), and Robert Martinez (Florida governor). Judge Sharp, subsequent to denying Bundy's first habeas petition but certainly aware that the case would most likely again be before him at some point in the future, "concentrate[d] on the case of Ted Bundy" when the judge testified before a (continued...)

former

Both perceptions are false. Section II of this article, in describing Bundy's cases and my minor and peripheral role in them, shows that in fact Bundy's

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14. (...continued)
congressional subcommittee studying habeas corpus reform. Statement of G. Kendall Sharp, Federal District Judge, Middle District of Florida, Orlando Division, *Who is on Trial? Conflicts Between the Federal and State Judicial Systems in Criminal Cases*, Hearings Before a Subcomm. of the Comm. on Government Operations, House of Representatives, 100th Cong., 2d Session, Feb. 25, 1988, at 62. After a lengthy recitation of the procedural history of Bundy's cases -- in Judge Sharp's courtroom and elsewhere -- Sharp's written statement to the subcommittee quoted the judge as having commented "that if every death-row inmate 'milked the system' as Bundy has done, then it would shut down the civil side of the courthouse." *Id.* at 78. *See also* Cotterell, *Death-appeals process examined*, Tallahassee Democrat, Feb. 27, 1988. Subsequent to Judge Sharp's testimony, Bundy's case did in fact come before him again. *See infra* at ___.

Robert Graham similarly uses Bundy to illustrate perceived flaws in the habeas statute. As Governor of Florida, Graham reportedly accused Bundy of trying to "endlessly manipulate" the legal system to delay his execution. Moline, *Graham and Cabinet consider clemency for Bundy*, United Press Int'l, Dec. 19, 1985. The day after Bundy received a federal court stay in 1986, Governor Graham was quoted as saying "again, we've seen a situation where people who have been on death row for many years wait until the last hour to raise claims." Hamilton, *Mass killers back in death row cells*, United Press Int'l, July 3, 1986. Graham's solution was reform of habeas: "I think that we've got to demand some changes at the federal level that says a person only has a reasonable number of years after his trial to bring these claims of constitutional deprivation. . . . It's an abuse of justice by questioning competency of counsel eight, 10, 12 years after the trial." *Id.* When he was elected to the Senate Graham proposed just such an amendment to the habeas statute, again characterizing Bundy's litigation as a "typical abuse of the process." *Graham Urges Time Limit on Death Appeals*, United Press Int'l, Jan. 26, 1989.

(Former) Governor Martinez's use of Bundy was described *supra* at note ___. *See also*, *e.g.*, B. Hooks & L. Kahn, *Death in the Balance* 119 (1989) ("In January 1989 Theodore Robert Bundy was *finally* electrocuted after a decade on Florida's death row") (emphasis added); Leguire, *Grant blasts Bundy delays*, Lake City [Fla.] Reporter, Feb. 22, 1988 ("Saying that convicted murderer Ted Bundy has made a mockery of the law, Congressman Bill Grant, D-Madison, is calling for an overhaul of the judicial system which would hasten executions. . . ").

postconviction cases were shoved through the legal system at a speed that can most charitably be characterized as unseemly and can most accurately be described as periodically frenzied. Further, *all* of the much-vaunted "delay" in Bundy's cases occurred while litigation was *pending* and proceeding in at least one court. Indeed there was no "delay" as the word is commonly understood. There was a ten year temporal gap between imposition and execution of sentence in Bundy's cases, but that temporal gap was caused by the courts rather than by Bundy or his lawyers. This is so because no time was lost by Bundy's failure to initiate litigation in a timely fashion.

The disparity between public perception and legal reality in Bundy's cases raises a separate constellation of intriguing inquiries. The distance between perception and reality is bridged -- and partially explained -- by metaphor. Bundy is seen as having received super due process, although he actually received minimal postconviction process of any meaningful kind, because he became a symbol: a symbol for evil and a mirror of the United States' deepest fears. Section III of this article explores why ~~ways in which~~ Bundy's notoriety warped the legal system's standards and procedures to an extraordinary extent. The judicial process created a series of "Bundy exceptions" to the rule of law. Despite the outward appearance of heightened due process (a decade of repetitive review; lawyers at trial and beyond), in reality the legal system failed.

This article is as much about cultural perception as it is about legalistic reality. The text certainly is not an attempt to discover the "real" Theodore Bundy or to

explain the man or his actions, real or perceived. The historical Bundy is not significant for the purposes of this article. Rather the inquiry focuses upon Bundy as a symbol constructed by United States' culture to represent death row and ~~in~~ the legal system's response to and interaction with that symbol/litigant. It is a symbol with which we, as members of that culture, ought to be profoundly uncomfortable, for reasons explained in section III.

This project therefore is not a piece of traditional legal scholarship.[15] The historian Barbara Du Bois coined a term that accurately describes this article's approach: passionate scholarship.[16] By passionate scholarship Du Bois meant scholarship that integrates experience with logic, subjectivity with objectivity, substance with process, and passion with responsibility. Such scholarship is overtly animated by the values and experiences of the writer -- here my experience as an advocate on behalf of condemned inmates and as a commentator on capital punishment. Those experiences influence one's choice of subject matter, one's willingness to write, and the way one conceptualizes the process of research and writing.

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15. For excellent nonlegal scholarly analyses of sexual murder and sexual homicide, analyzed from refreshingly feminist perspectives, see D. Cameron & E. Frazer, *The Lust to Kill* (1989); J. Caputi, *The Age of the Sex Crime* (1987).

16. Du Bois, *Passionate Scholarship: Notes on Values, Knowing, and Method in Feminist Social Science*, in THEORIES OF WOMEN'S STUDIES (G. Bowles ed. 1983). Du Bois was describing the aims of feminist research. *See also infra* note 166.

II. Bundy's Interaction with the Capital Punishment Bureaucracy: Where Did the Time Go?

> I can't understand your behavior. This case is going to be reversed and sent down there [to federal district court] because of a stupid error.[17]

I first encountered the Bundy phenomenon in 1986 when I was an attorney in a then-newly created Florida state agency,[18] the office of the Capital Collateral Representative (CCR), that had as its statutory mandate the representation of all Florida death row inmates in post-conviction proceedings.[19] Bundy's cases had not

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17. Judge Robert Vance, United States Court of Appeals for the Eleventh Circuit, addressing the attorney representing the State of Florida during oral argument in Bundy v. Wainwright, 808 F.2d 1410 (11th Cir. 1987) (quoted in A. Rule, *supra* note 5, at 458).

Rule's book is the most complete source available for the words Judge Vance used during the argument. Eleventh Circuit oral arguments are not available to the public, either in recorded or transcript form. The Rule book is reliable in this instance, because the substance of the book's quotations are confirmed by the only accessible contemporaneous accounts of the argument. *See* Parham, Domestic News, United Press Int'l, Oct. 23, 1986 (quoting Judge Vance as saying "this case is going to be reversed on a stupid error. . . "); *Smith blasts federal court in Bundy Case*, United Press Int'l, Oct. 24, 1986 (same). Rule's quotations also confirm conversations I had with Judge Vance shortly after the *Bundy* argument. Based upon Judge Vance's descriptions to me of what he said and what he meant by lambasting the prosecutor, it appears that Rule's book captured the flavor of the exchanges between judge and counsel.

18. *See generally* Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 Am. U.L. Rev. 513, 567-603 (1988) (describing the state agency and the counsel crisis that led to its creation).

19. That is, CCR represented all unrepresented Florida inmates who had been condemned by a Florida trial court, whose cases had been affirmed by the Florida Supreme Court, denied certiorari review by the United States Supreme Court, and (explicitly or implicitly) denied executive clemency by the governor and executive cabinet.

yet been through the state post-conviction or federal habeas corpus processes. Such post-conviction litigation was CCR's mission.

Appreciation of the task facing CCR requires understanding of what capital postconviction investigation and litigation involve.[20] A former Justice of the Florida Supreme Court was fond of asking at oral argument why, if he could read a trial transcript in a few hours, it took so much time to put together a post-conviction petition in a capital case. The answer is that reading the transcript is only the *first* step in the process of constructing a proper post-conviction litigation.

In addition to mastering the trial transcript and direct appeal record as well as the relevant substantive and procedural law, effective post-conviction litigation requires a complete factual reinvestigation of the case -- with a focus on material *not* in the trial transcript. What evidence was *not* presented and why? What evidence was *not* investigated and why? The trial transcript provides clues, but those clues mark only the beginning of the post-conviction litigator's task.

The post-conviction litigator must locate and review the trial court docket sheets, files, and records that are maintained in the trial court, including physical evidence, exhibits, and notes of the court clerk about proceedings not designated as part of the formal record on direct appeal. Witnesses must be located and interviewed, including co-defendants and prior counsel. Records of proceedings relevant to co-defendants must be obtained and reviewed. Media coverage must be

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20. *See generally* J. Liebman, *Federal Habeas Corpus Practice and Procedure* (1989).

gathered and reviewed.[21] Often collateral litigation must be initiated to obtain discovery of these matters.[22] In most cases a post-conviction psychiatric examination must be arranged and efforts must be made to ensure that such examination is conducted properly.[23] Any prior conviction that played a role at trial or penalty phase must also be reinvestigated for validity.[24]

Because capital post-conviction litigation often turns on trial counsel's failure to investigate mitigating evidence,[25] the post-conviction investigation requires not only an informed evaluation of trial counsel's performance but also a complete background investigation of the inmate's life -- literally from embryo to death row.[26] This investigation often requires counseling with the inmate's family members, loved ones, and friends in order to reveal intimate information often critical to the litigation. Such an investigation must cover the inmate's upbringing, education, relationships,

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21. *Eg.*, Coleman v. Kemp, 782 F.2d 896, 897-98 (11th Cir. 1985) (discussing influence of media publicity on fair trial).

22. *See* FLA. STAT. ANN. § 119 (Harrison Supp. 1987) (inspection of public records); In re. Tribune Co., 493 So.2d 480 (Fla. 2nd Dist. Ct. App. 1986); Downs v. Austin, 522 So.2d 931 (Fla. 1st Dist. Ct. App. 1988).

23. *See* State v. Sireci, 502 So.2d 1221, 1223 (Fla. 1987).

24. *See* Johnson v. Mississippi, 109 S. Ct. ___ (1988).

25. Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 345 (1983).

26. The inmate's conduct on death row must also be investigated, because good behavior is admissible evidence in mitigation at a resentencing hearing. Skipper v. South Carolina, 106 S. Ct. 1669, 1671 (1986).

important experiences, and overall psychological make-up.[27] Many crucial witnesses, such as childhood friends, teachers, ministers, and neighbors may be "scattered like a diaspora of leaves along the tracks of the defendant's travels,"[28] yet they must be located and interviewed within a short period of time if they are to offer favorable post-conviction evidence.

The investigation described above must be undertaken in every capital postconviction case. At the time CCR was created in mid-1985, approximately 200 people lived on Florida's death row. About half of these had not reached the state post-conviction litigation stage, and so they were not yet represented by CCR. Of the approximately 100 cases that were in the post-conviction phases of litigation, 30 or so inmates were represented by volunteer, *pro bono* counsel. CCR was not directly responsible for those prisoners, although it did what it could to help the *pro bono* lawyers. That left about 70 inmates, divided among four experienced CCR lawyers. At any given time, between two and four of these prisoners had execution dates scheduled. In Florida, execution dates are triggered by the governor's signing a death warrant.[29] The subject of the warrant will be put to death if a stay is not obtained prior to the execution date specified in the warrant.

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27. Goodpaster, *supra* note ___ at 324.

28. *Id.* at 321.

29. Only in New Hampshire and Florida are execution dates scheduled by the executive. In the remaining 35 capital punishment states, execution dates are set by the state courts.

Given the amount of work and emotional energy required by capital postconviction litigation,[30] CCR's caseload was staggering. I have never worked so hard in my life and never will again. Life (mine) is too short. The office's employees -- lawyers, investigators, support staff -- routinely worked 100 hour weeks and 15 hour days. In frequent crises the hours were longer. During an especially frenetic six week period in 1986,[31] one CCR lawyer seldom left the office except to shower. Maniacal commitment to the clients, and not nearly enough time in the day or night to fulfill that commitment, was the quintessential part of the job description.[32]

Into this insanity called a law office plopped the Bundy cases, with an execution date scheduled for four weeks hence. It soon became clear that Bundy's cases could overwhelm CCR's paper-thin resources. When the office became involved in his litigation, Bundy's death warrant had been signed by the governor on February 5, 1986. The killing was scheduled for March 4, 1986, at 7:00 a.m.

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30. Mello, *supra* note 17, at 530-65 (discussing the complexity and other difficulties of conducting capital post-conviction litigation).

31. Three people represented by CCR were executed during this period.

32. The office's crushing caseload raised serious ethical dilemmas, ethical dilemmas that have led courts and commentators to conclude that such caseloads render effective representation impossible. *E.g.*, Cooper v. Fitzharris, 551 F.2d 1162 (9th Cir. 1977), *modified*, 586 F.2d 1325 (9th Cir. 1978); State v. Smith, 681 P.2d 1374, 1381 (Ariz. 1984); Babb v. Edwards, 412 So.2d 859, 862 (Fla. 1982); Haggens v. State, 498 So.2d 953 (Fla. Dist. Ct. App. 1986); Schwartz v. State, 495 So.2d 1208, 1209 (Fla. Dist. Ct. App. 1986); State v. Behr, 354 So.2d 974, 975 (Fla. Dist. Ct. App. 1978), *aff'd*, 384 So.2d 147 (Fla. 1980); Note, *The Right to Counsel and the Indigent Defense System*, 14 N.Y.U. Rev. L. & Social Change 221 (1978).

Hatten v. State, — So. 2d — (Fla. May 3, 1990);

Bundy had been convicted of first degree murders by two different Florida juries. The juries had returned non-binding sentencing recommendations[33] that capital punishment be imposed, and the trial judges in the two cases had agreed with the jury recommendations and sentenced Bundy to death. The Florida Supreme Court had affirmed the convictions and sentences.[34] Bundy had fired his appellate lawyer and filed a pro se, out-of-time certiorari petition in the case that was the subject of the death warrant. He also was posturing publicly with the governor about executive clemency.[35]

Like most Floridians, I knew about the Bundy cases--or I thought I did. There were really two Bundy cases, each proceeding on different litigation tracks. In one case, Bundy was on death row for bludgeoning to death two Tallahassee sorority women, Lisa Levy and Margaret Bowman, in the Chi Omega Chapter house[36] at Florida State University.[37] The crime occurred in 1978; Bundy was convicted and condemned in 1979. The direct appeal had been orally argued in the Florida

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33. *See infra* note 32.

34. Bundy v. State, 471 So.2d 9 (Fla. 1985); Bundy v. State, 455 So. 2d 330 (Fla. 1984).

35. R. Larsen, *supra* note 4, at 351.

36. In addition to Ms. Levy and Ms. Bowman, several other women were beaten severely on the night of the crimes. *See* R. Larsen, *supra* note 4, at 245-58; S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 213-19; A. Rule, *supra* note 5, at 264-80.

37. The house where the killings took place was located about two blocks from my law office. I often passed it on my way to work.

Supreme Court in 1982. The court affirmed the convictions and sentences in *1984--five years* after their imposition.[38] It was for these two murders that Bundy was scheduled to die on March 4, 1986.

In addition to the Chi Omega case, Bundy had been condemned for killing twelve-year-old Kimberly Leach in Lake City, Florida in 1978. Bundy was convicted and sentenced in 1980. This case had been affirmed in 1985 by the Florida Supreme Court,[39] though the time for seeking United States Supreme Court review had not yet expired as of the time that the death warrant was signed on the Chi Omega case.

Bundy was also suspected of dozens of West Coast crimes, but he had been convicted of only one: the kidnapping in Utah of Carol DeRonch.[40] At the time of the Florida murders, Bundy was an escapee from an Aspen Colorado jail where he had been about to go on trial for the kidnapping and murder of Caryn Campbell.

Most palpably, Bundy was hated. He was loathed by the public, despised by the media, and feared (if secretly) by some death penalty abolitionists who felt uncomfortable explaining why Bundy ought not be killed.[41] Bundy had become

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38. Bundy v. State, 455 So. 2d 330 (Fla. 1984).

39. Bundy v. State, 471 So. 2d 9 (Fla. 1985).

40. R. Larsen, *supra* note 4, at 134-49 (describing trial); S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 153-71 (same); A. Rule, *supra* note 5, at 187-90 (same). Bundy was sentenced to 1 to 15 years in prison. The Utah Supreme Court affirmed the conviction. State v. Bundy, 589 P.2d 760 (Utah 1978).

41. *See infra* note ___.

synonymous with evil and a personification of whom the United States wanted to execute.

The office designated a "Bundy room" in which to organize the massive amounts of paper generated by his cases. Mark Olive, the office's chief litigator, was Bundy's lead counsel; my job was to assist Olive. I read the trial transcripts of the Kimberly Leach (Lake City) case, transcript summaries of the Chi Omega (Tallahassee) case, and endless other documents in the cases.

I learned from my reading that reporters covering the Chi Omega trial thought that the odds of conviction, based on the evidence presented to the jury, were even: 50-50.[42] The jury initially deadlocked 6-6 on whether Bundy should die,[43]

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42. Rule wrote that "moving into final arguments, the press was still wagering even odds on the outcome of the trial," and that as the jury deliberated Bundy's guilt the "odds were still even. Fifty-fifty. Acquittal or conviction." *See* A. Rule, *supra* note 5, at 375, 383; *see also id.* at 365 ("the word was that Bundy might win"). Larsen agreed. *See* R. Larsen, *supra* note 4, at 306 (following trial court's ruling that Bundy's statements made during custodial interrogation must be suppressed because they had been obtained in violation of Bundy's constitutional rights, "suddenly Ted Bundy's defense had a winnable case"); *id.* at 317 (during jury deliberations, some reporters predicted acquittal and others conviction; "[o]bviously there was reasonable doubt in the state's mostly circumstantial case").

43. "The jury would say later that they had been split at one point with a six-to-six deadlock, a deadlock that had been broken after ten minutes of 'prayer and meditation.'" A. Rule, *supra* note 5, at 392. A six-to-six deadlock would have constituted a life recommendation, a legal rule not evident at the time of Bundy's trial and a fact about which Bundy's jury was never informed.

In Florida, jury sentencing recommendations of life or death need not be unanimous. This is clear from the statutory language. *See* Fla. Stat. 921.141(3). But although the capital statute speaks in terms of a recommendation by a "majority" of the jury, the Florida Supreme Court has held (subsequent to Bundy's sentencing)
(continued...)

notwithstanding that (1) the community from which the jury was selected had been saturated for months before the trial with publicity about Bundy as mass rapist/murderer,[44] and (2) by operation of the process by which capital juries are death qualified, all immovable opponents of the death penalty had been culled from Bundy's jury.[45]

Surprisingly, the evidence of guilt presented to Bundy's Chi Omega jury was "not overwhelming."[46] The jury reportedly needed to take five votes before the jurors

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43. (...continued)
that a split vote of 6-6 is to be treated as a recommendation of life imprisonment. *See* Patten v. State, 467 So. 2d 975, 979 (Fla. 1985); Rose v. State, 425 So.2d 521, 525 (Fla. 1983). Bundy's jury was not told that a 6-6 vote was would have been sufficient for a life recommendation.

44. Even after the trial's venue was changed from Tallahassee in north Florida to Miami in south Florida, 450 miles away, Rule thought it "extremely doubtful that Ted Bundy could ever have received an impartial trial in the state of Florida. He was becoming better known than Disney World, the Everglades, and the heretofore all-time media pleaser: Murph the Surf." A. Rule, *supra* note 5, at 340. *See also* S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 265 (Chi Omega prosecutors "were working with a jury sensitized by seventeen months of publicity since the sorority house murders. The men and women selected to judge Ted Bundy might honestly tell the court their verdict would be based upon the evidence, but the overwhelming bulk of what they had been exposed to in the media was suggestive of guilt. Never was Ted Bundy mentioned except in connection with murder and mayhem"); R. Larsen, *supra* note 4, at 327 (By the time the Leach trial began in January 1980, "Florida and other states had been saturated with publicity about Ted Bundy, the 'multiple murder suspect,' convicted killer of the Chi Omega" women).

45. *E.g.*, Darden v. Wainwright, 477 U.S. 168 (1986); Lockhart v. McCree, 476 U.S. 162 (1986).

46. R. Larsen, *supra* note 4, at 296.

This article draws no conclusions about Bundy's actual guilt or innocence. Popular writers studying Bundy's case, including some ostensibly predisposed to (continued...)

were unanimous on guilt.[47] The scientific evidence was "at times equivocal and produced sharply differing opinions among the experts called to testify. No finger-prints were found."[48] Both Florida cases against Bundy relied upon the testimony of eyewitnesses. Yet the eyewitnesses had undergone police hypnosis before they testified. Bundy's lawyers challenged the reliability of such hypnotically "refreshed" or "created" testimony. The Florida Supreme Court agreed that hypnosis destroys the reliability of memory and its resulting testimony and held in Bundy's cases that such testimony would *henceforth* be *per se* inadmissable in Florida courts.[49] The court, however, managed to affirm Bundy's convictions and sentences.[50] This was my first encounter with what some have come to call the Bundy exception to the

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46. (...continued)
find him innocent, have universally concluded that he was guilty of at least several sexual murders. This material has never undergone adversarial testing, but the cumulative weight of the cases made against Bundy by Michaud, Aynesworth, Rule, and Larsen cannot be dismissed for that reason alone. *Cf.* Menkel-Meadow, *Portia in a Different Voice*, 1 Berkeley Women's L.J. 39 (1985) (questioning the efficacy of the adversarial model as a way of solving problems and ascertaining truth); Menkel-Meadow, *Toward Another View of Legal Negotiation*, 31 U.C.L.A. L. Rev. 754 (1984) (same); Polan, *Toward a Theory of Law and Patriarchy*, in *The Politics of Law* (D. Karyes ed. 1980) (same).

47. S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 273.

48. S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 9. "In fact, in the dozens of cases from Seattle to Florida in which the police have sought to implicate Bundy, there has not been a single bit of evidence that incontrovertibly demonstrates his involvement in anything more sinister than car theft." *Id.*

49. *See supra* note 24.

50. Coleman, *supra* note ___, at 17 (describing hypnotized testimony in Leach case).

rule of law: Hypnotically "refreshed" testimony was *per se* unreliable and thus inadmissable as evidence--except in Bundy's cases.

The prosecutors in both Florida cases had offered Bundy negotiated pleas of life imprisonment in exchange for Bundy's agreement to plead guilty to the crimes--[51] because, most likely, of the weakness of the evidence against Bundy. Bundy rejected the plea bargains, acting against the strident advice of his family and his lawyers. Bundy was convinced that he could prove his innocence at trial.[52]

Bundy's trial attorneys were concerned that he was mentally incompetent to stand trial. This resulted in a competency hearing scripted by Kafka, with Bundy and two psychiatrists (asserting that he *was* competent) pitted against his senior trial lawyer and a third psychiatrist (who questioned whether Bundy was competent).[53] Because Bundy demanded that he be deemed competent, and because he looked and sounded competent, the judge found him competent.[54]

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51. W. White, *The Death Penalty in the Eighties* 35-36 (1987); *see also* R. Larsen, *supra* note 4, at 296-300; S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 255-58; A. Rule, *supra* note 5, at 343-44.

52. R. Larsen, *supra* note 4, at 298-300; S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 255-58; A. Rule, *supra* note 5, at 344.

53. R. Larsen, *supra* note 4, at 343-46; A. Rule, *supra* note 5, at 345; S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 250-52, 258-59, 266; *see also* Coleman, *supra* note ___, at 16.

54. Immediately prior to closing arguments in the Chi Omega trial, Bundy's lawyers moved to revisit the competency issue. The court refused. R. Larsen, *supra* note 4, at 314.

Bundy had been denied his defense lawyer of choice, Atlanta attorney Millard Farmer.[55] Farmer is one of the best capital defense lawyers in the country. Because he was a Georgia lawyer and not a member of the Florida bar, however, Farmer was required to seek permission to appear *pro hac vice* in the Florida courts as Bundy's counsel. Such requests are routinely granted, but in Bundy's case it was denied. It was denied in general because Farmer had a reputation of being "disruptive" and in particular because he had an outstanding contempt of court citation in Georgia.[56] That citation[57] was based on Farmer's relentless insistence that the prosecutor in a Georgia capital trial refer to the Black[58] defendant, George Street, as "Mr. Street" rather than "George," since the prosecutor referred to all other participants in the case (including prospective jurors) as "Mr.," "Miss" or "Mrs." The prosecutor refused, instead referring to the defendant by his first name as did Farmer. The trial judge ruled that this behavior by the prosecutor (racist, in

55. *See generally* Bundy v. Rudd, 581 F.2d 1126 (5th Cir. 1978) (finding no federal constitutional error in Florida's refusal to permit Farmer to represent Bundy); *cf.* R. Larsen, *supra* note 4, at 294-95 (discussing Farmer's attempts to represent Bundy).

56. S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 252, 254; A. Rule, *supra* note 5, at 374.

57. Farmer v. Holton, 245 S.E. 2d 457, 146 Ga. App. 102 (1978) (upholding contempt citation and describing facts).

58. "I capitalize 'Black' because I regard it not simply as a colour but as a cultural, personal, and political identity." Joseph, *Review of Women, Race, and Class*, 9 Signs 134, 134 (1983).

the language code of the South)[59] was fine. Farmer's unrelenting refusal to permit the trial to proceed under these circumstances earned him the contempt citation that disqualified him from appearing as Bundy's trial lawyer.[60] The attorneys who did represent Bundy at trial were zealous but inexperienced.[61] They also clashed with Bundy over trial tactics.[62] Bundy understandably never got over his anger at being denied the counsel of his choice.[63] Farmer's consummate lawyering skills and experience could well have made the difference between life or death in Bundy's case. Even with the lawyers who did represent him, the sentencing jury was at one point divided 6-6.[64]

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59. *Eg.*, R. Kluger, *Simple Justice* 223 (1980) (as a lawyer for the NAACP Legal Defense and Educational Fund, Thurgood Marshall was rarely "treated as less than a gentleman in the courtroom except by an occasional clerk or bailiff who might call him by his first name"); *id*. at 263 (describing Marshall's successful objection to a prosecution's practice of calling Marshall's Black "client by his first name").

60. To further make his point, Farmer insisted upon calling the judge by his first name.

61. Rule, who was present for the Chi Omega trial, characterized Bundy's lawyers as "all young, all determined to do their best, and all woefully inexperienced." A. Rule, *supra* note 5, at 346; *see also id*. at 360, 375; *accord* S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 262-63, 269, 270-71. For example, the attorney whom Bundy insisted do closing argument in the Chi Omega case was an appellate lawyer with no previous felony trial experience. R. Larsen, *supra* note 4, at 316; S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 262-63.

62. *E.g.*, R. Larsen, *supra* note 4, at 296, 299, 310, 313-14; S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 256-58; A. Rule, *supra* note 5, at 335, 344-45, 346, 372-73, 375.

63. A. Rule, *supra* note 5, at 335, 337-38, 373. Bundy continued throughout the trial to request Farmer. A. Rule, *supra* note 5, at 342, 373, 389.

64. *See supra* note 32.

As Bundy's postconviction lawyers delved more deeply into the cases, it became evident that Bundy's cases would be a massive job to investigate and litigate. Representing him would have been the equivalent of adding ten cases to my office's already crushing and savage workload.[65]

A more immediate problem confronted the office, however. Jurisdictionally, it could not represent Bundy in seeking certiorari review of the Florida Supreme Court's direct appeal decision; the office could only represent him in the post-conviction stages. To have undertaken his immediate representation would have required bypassing certiorari review and going directly into state post-conviction litigation. That avenue was unattractive, since at least one direct appeal issue (the hypnotism claim) was ripe for plenary Supreme Court consideration.[66] The posture was further confused because Bundy had fired his direct appeal lawyer and was representing himself *pro se* in the United States Supreme Court. He had filed a *pro se*, out-of-time certiorari petition and a handwritten stay application.

(The office) ~~CCR~~ began to explore quietly the possibility of placing Bundy's case with a private law firm willing to represent him *pro bono*, at least as to the immediate

65. *See supra* notes 20-22 and accompanying text.

66. Soon after denying certiorari in Bundy's case, the Supreme Court granted certiorari in another case to examine the constitutional consequences of hypnotically-affected testimony. *See* Rock v. Arkansas, 483 U.S. 44 (1987) (criminal defendant's testimony on his own behalf cannot be excluded because it was hypnotically affected).

certiorari petition. I had in the past consulted on another Florida death case[67] with the Washington, D.C. law firm of Wilmer, Cutler and Pickering. The firm had done a superb job on that other case. I asked James Coleman, a partner in the firm, to consider taking on, without pay, the most complicated, notorious, and emotionally supercharged capital case of the decade. After much freeform negotiation and soul searching, Coleman and an associate, Polly Nelson,[68] agreed (on February 19, sixteen days before the scheduled execution date) to represent Bundy. Initially, the firm made a commitment only to represent Bundy in the United States Supreme Court on the out-of-time certiorari petition and stay application. Gradually, however, Coleman and Nelson took over more and more of the cases. Eventually the firm was Bundy's sole counsel.

At this point, recall, certiorari review of the Chi Omega case--the case with the scheduled March 4, 1986 execution date--had been sought only through Bundy's *pro se*, out-of-time certiorari petition which Bundy had supplemented with a handwritten stay application filed soon after the death warrant had been signed. Justice Powell, Circuit Justice for the Eleventh Circuit (which includes Florida), denied the stay without prejudice and instructed Bundy to obtain proper legal counsel "to

67. The other Florida inmate represented by the firm was Steven Todd Booker, whose case is described in Mello, *supra* note 17, at 581-85.

68. Coleman was a civil litigator specializing in regulatory law. Nelson was a recent law school graduate. S. Michaud & H. Aynesworth, *Witness, supra* note 5, at 317; *see also* Coleman, *supra* note ___, at 14.

file an amended application that complies with the rules of this Court."[69] Translated, this was a suggestion that Bundy first seek a stay of execution from the Florida Supreme Court before coming to the United States Supreme Court for a stay. Thus encouraged, Bundy's lawyers filed for a stay in the Florida Supreme Court, which was summarily denied. The attorneys ~~They~~ then filed in the United States Supreme Court a stay application along with a request to file an amended, out-of-time certiorari petition. The Court granted both on February 26, nine days before the scheduled execution date.[70] The execution was therefore stayed until such time as the amended certiorari petition could be filed and decided by the Supreme Court.

For the moment the crisis was over. My role as direct participant in Bundy's cases also was over. Henceforth Coleman and Nelson would be Bundy's lawyers, and my role would be that of one peripheral advisor among many.

In May 1986 the Supreme Court denied certiorari in the Chi Omega case, simultaneously dissolving the stay.[71] That decision was front-page news in Florida.[72] Ordinarily Bundy's lawyers would have been granted some time to react before a

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69. A. Rule, *supra* note 5, at 438.

70. Bundy v. Florida, 475 U.S. 1041 (1986). The events leading up to the stay are described in A. Rule, *supra* note 5, at 438.

71. Bundy v. Florida, 476 U.S. 1109 (1986).

72. The timing of the denial was, wrote Rule, ". . . all show-biz perfection. The Court's answer [denying certiorari] was announced during a break in a two-part mini-series about Ted. Mark Harmon (*People Magazine's* "Sexiest Man Alive") played Ted . . . . [H]e played Ted Bundy . . . as a young Kennedy clone." A. Rule, *supra* note 5, at 448.

new execution date was set.[73] But this was Bundy, and Bundy was different. Seventeen days after the Supreme Court declined certiorari review, the governor signed a second death warrant on Bundy as to the Chi Omega case. The warrant was signed on May 22, and the execution was scheduled for July 2.

It is difficult to describe in words the frenetic activity of that month leading up to the scheduled July 2 execution.[74] Between June 19 and June 31,[75] Bundy's lawyers unsuccessfully sought post-conviction relief (and stay of the execution) from the state trial court, the Florida Supreme Court[76] and the federal district court.[77] The district court denied an indefinite stay without bothering to obtain, much less read, the 15,000 page state court record in the case upon which Bundy's constitutional claims were based. The state court record was in the trunk of the prosecutor's car

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73. Bundy's lawyers attempted to convince the governor to wait before signing a warrant. Coleman, *supra* note ___, at 18.

74. Coleman wrote that he and Nelson "worked feverishly to complete our review of the Chi Omega record and to prepare the state and federal papers for collateral relief." Coleman, *supra* note ___, at 18; *see also Id*. at 18-19 (describing efforts). Rule described that period as ". . . wild. Polly Nelson and Jim Coleman had spent consecutive nights without sleep, racing the clock set by Ted's death warrant." A. Rule, *supra* note 5, at 458.

75. Coleman, *supra* note ___, at 18.

76. Bundy v. State, 490 So.2d 1257 (Fla. 1986) (decided June 26, 1986); Bundy v. State, 490 So.2d 1258 (Fla. 1986) (decided June 30, 1986).

77. Bundy v. Wainwright, 651 F. Supp. 38 (S.D. Fla.) (decided July 2, 1986), *rev'd*, 808 F.2d 1410 (11th Cir. 1987).

during the short time that the district court had the case under consideration.[78] The district judge granted a 24 hour stay to permit Bundy time to live long enough to appeal his rulings. The United States Court of Appeals for the Eleventh Circuit stayed the execution indefinitely,[79] less than fifteen hours[80] before the rescheduled execution. The court put the case on an expedited briefing and oral argument timetable.[81]

Meanwhile, Bundy's lawyers had, during the summer of 1986, filed a timely certiorari petition asking the United States Supreme Court to grant plenary review in the Kimberly Leach case. On October 14, 1986, the Court refused.[82] *Seven days* later, on October 21, the governor signed a death warrant as to that case--setting the execution for a month in the future.[83] Coleman and Nelson repeated the same drill as in the Chi Omega case -- only more frantically, being denied stays by *three courts* (the state trial court, Florida Supreme Court, and federal district judge G.

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78. Bundy v. Wainwright, 808 F.2d 1410, 1414 (11th Cir. 1987); Coleman, *supra* note ___, at 18.

79. Bundy v. Wainwright, 794 F.2d 1485 (11th Cir. 1986) (decided July 2, 1986).

80. A. Rule, *supra* note 5, at 451.

81. Coleman, *supra* note ___, at 52.

82. Bundy v. Florida, 479 U.S. 894 (1986).

83. *See* Emergency Application for a Stay of Execution to Preserve Jurisdiction Pending Filing and Disposition of Petition for Writ of Certiorari to the Florida Supreme Court, at 2, Bundy v. Florida, 109 S. Ct. 887 (1989) (copy on file with author); Coleman, *supra* note ___, at 19.

Kendall Sharp)[84] in *one day*.[85] Again, the Eleventh Circuit stayed the execution.[86] The prosecutors unsuccessfully petitioned the Supreme Court to dissolve the stay.[87] The Court upheld the stay -- less than seven hours before Bundy was to have been electrocuted.[88] So, by late-1986, both Bundy cases were in the Eleventh Circuit. Both cases were on chillingly expedited briefing and oral argument schedules.

The Eleventh Circuit oral argument in the Chi Omega case was remarkable for its heat. The judges seemed dumbfounded (a) that the district court could have denied habeas relief (and a stay) without even making a pretense of looking at the 15,000 page record of the state court proceedings upon which Bundy's constitutional claims were based, and (b) that the prosecutors could have led the

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84. *See supra* note ___.

85. Letter from Margaret Vandiver to Michael Mello, Aug. 14, 1990, at 3 (copy on file with author). Vandiver wrote: Bundy was denied stays by "three courts in one day. We were denied in [state trial] court about 11 in the morning of November 17th. Polly and Jim went to Tallahassee, and I drove the [federal district court] papers to Orlando. The [Florida Supreme Court denied a stay] sometime in the early afternoon, and I filed the [district court] papers around 2:30. The [district] judge denied the stay at about 10:30 p.m. on the 17th." *Id.* *See* Bundy v. State, 497 So.2d 1209 (Fla. 1986) (decided November 17, 1986); Bundy v. Wainwright, 805 F.2d 948 (11th Cir. 1986) (decided November 18, 1986). The federal district court's opinion of November 17, 1986, denying the stay, is unpublished. *See* Order, Bundy v. Wainwright, No. 86-968-CIV-ORL-8 (date stamped at 10:48 p.m., Nov. 17, 1986) (copy on file with author); *see also* Coleman, *supra* note ___, at 19.

86. Bundy v. Wainwright, 805 F.2d 948 (11th Cir. 1986).

87. Wainwright v. Bundy, 107 S. Ct. 1837 (1986).

88. S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 316; A. Rule, *supra* note 5, at 458. "Bundy had already been fitted for his funeral suit from Jim Tatum's Fashion Showroom in Jacksonville ($69.95)." S. Michaud & H Aynesworth, *Witness*, *supra* note 5, at 316.

district court into such a glaring error. Judge Robert Vance, no bleeding-heart friend of death row by any stretch of the imagination,[89] blistered the prosecutor: "I can't understand your behavior. This case is going to be reversed and sent down there [to district court] because of a stupid error. If you had called it to the attention of the [district] judge at the time, it could have been corrected in four days. It's wrong. It's clearly wrong, counsel. It's not arguable by an attorney of integrity."[90] Later in the argument, Judge Vance moderated his frustration a bit and allowed as "maybe the court has been a little too harsh on you personally, counsel."[91] Still, the handwriting was on the wall. The Eleventh Circuit intended to remand the Chi Omega case. In fact, the court planned to send both Bundy cases back.

In 1987, the Eleventh Circuit remanded both Bundy cases to the respective district courts for evidentiary hearings on Bundy's mental competency to stand trial.[92] Again, the proceedings were to be truncated. The district judge in the Chi Omega habeas case, who was new to the federal bench[93] (and whose error had been

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89. Mello, *Rough Justice: The Capital Habeas Corpus (Anti)Jurisprudence of Judge Robert Vance*, ___ Ala. L. Rev. ___ (Jan. 1991).

90. A. Rule, *supra* note 5, at 458. *See also supra* note ___.

91. *Id.*

92. Bundy v. Wainwright, 808 F.2d 1410 (11th Cir. 1987) (Chi Omega case); Bundy v. Dugger, 816 F.2d 564 (11th Cir. 1987) (Kimberly Leach case).

93. According to Rule, Bundy's was his first capital habeas case since becoming a federal judge. A. Rule, *supra* note 5, at 458.

termed "stupid" by Judge Vance in the appellate oral argument), appeared determined to proceed with extreme deliberation; events in that judge's court progressed at a snail's pace. By contrast, the district judge in the Leach habeas case, G. Kendall Sharp, moved with lightning speed. He held the evidentiary hearing on Bundy's competency to stand trial[94] and unceremoniously ruled against Bundy.[95] The Leach case therefore returned to the Eleventh Circuit, while the Chi Omega case languished in district court limbo until the end of Bundy's life.

The Eleventh Circuit accelerated briefing and oral argument in the Leach case. In mid-1988 the court affirmed the district court's denial of habeas relief.[96] In December 1988, Bundy's lawyers filed a certiorari petition asking the Supreme Court to review the decision of the Eleventh Circuit. The justices conferenced on the case on Friday, the 13th of January, 1989--not a good sign. Shortly after 10:00 a.m. on Tuesday, January 17, 1989, the Court released its order denying certiorari in the

94. Coleman, *supra* note ___, at 53 (summarizing Bundy's claim of mental incompetency); *see also* A. Rule, *supra* note 5, at 462-70 (summarizing Bundy's incompetency claim and the prosecution's counter-arguments); S. Michaud & H. Aynesworth, *Witness, supra* note 5, at 217-23 (same).

95. Bundy v. Dugger, 675 F. Supp. 622 (M.D. Fla. 1987), *aff'd*, 850 F.2d 1402 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 849 (1989). Rule described the district judge's actions as "swift, impatient and firm." A. Rule, *supra* note 5, at 470. According to Coleman, Judge Sharp was "quoted by a reporter as saying that the proceeding was a waste of time." Coleman, *supra* note ___, at 53.

96. Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988).

Leach case.[97] Within minutes, the governor signed a seven day death warrant.[98] The execution was scheduled for Tuesday, January 24, 1989, at 7:00 a.m.

The Supreme Court's decision denying certiorari had been predictable, and Bundy's lawyers were as ready as could have been expected. The day after the warrant was signed, Coleman and Nelson flew from D.C. to Florida to seek a stay from the state trial court in Lake City, in central Florida. The stay application was filed in the morning of January 18 and was denied before noon the next day.[99] Minutes after the stay was denied on January 19, the Florida Supreme Court announced that it would hear oral arguments the following morning in Tallahassee.[100] Coleman and Nelson flew from Lake City to Tallahassee and spent the night preparing a brief for the Florida Supreme Court. The brief was filed in the early morning hours of January 20. Oral argument began at 9:00 a.m. The Florida

97. Bundy v. Dugger, 109 S. Ct. 849 (1989).

98. *See* Emergency Application, *supra* note 67, at 3; *see also* Coleman, *supra* note ___, at 14 (warrant signed less than 15 minutes after certiorari denial); S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 229-31; *cf.* S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 331 (governor signed warrant "within the hour" of the Court's certiorari denial); A. Rule, *supra* note 5, at 473 ("the Supreme Court denied [review] and [Governor] Martinez immediately signed that death warrant").

99. S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 331-34; *id.* at 333-34 (summarizing issues raised).

100. S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 334.

Supreme Court denied the stay shortly after noon, less than an hour after the conclusion of oral argument.[101]

Soon after the Florida Supreme Court denied the stay, Coleman and I had a lengthy and wide-ranging telephone conversation.[102] The initial thrust of the discussion was to explore what Coleman and Nelson ought to do next--should they go to the United States Supreme Court to seek a stay, or should they go directly to the federal district court? In the course of the conversation, however, it became clear that Bundy's case contained a previously unexplored constitutional issue.[103] It was an issue that had formed the basis of stays in several Florida cases prior to Bundy's --[104] although constitutional developments subsequent to Bundy's execution

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101. S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 334-36. The court's opinion denying the stay is reported as Bundy v. State, 538 So.2d 445 (Fla. 1989).

102. By this time, I had left Florida, worked at Coleman's law firm for a time, and was teaching at Vermont Law School.

103. Ordinarily, the late discovery of the issue (following trial, direct appeal, state post-conviction and federal habeas corpus review) would have foreclosed judicial review of its merits. *E.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977); Robbins, *Whither (or Wither) Habeas Corpus?*, 111 F.R.D. 265 (1986). The state courts in *Bundy* forgave the procedural default, however, and rejected the claim on its merits. *See* Bundy v. Dugger, 109 S.Ct. 849, 849 (1989) (Brennan, J., dissenting from denial of stay) (explaining why no procedural bar foreclosed federal judicial review of Bundy's constitutional claim). Still, our untimely discovery of the issue undoubtedly reduced the likelihood of being able to convince a court to grant a stay or more substantive relief based on the claim.

104. *E.g.*, Preston v. Florida, 109 S. Ct. 28 (1988) (order granting stay of execution pending the filing and disposition of a timely petition for writ of certiorari) (cited in Bundy v. Dugger, 109 S. Ct. 848, 849 (1989) (Brennan, J., dissenting from denial of stay)). The Supreme Court's order granting the stay in *Preston* did not
(continued...)

established Bundy's ultimate disentitlement to relief under the claim.[105] It was an issue then under active consideration by the United States Supreme Court in

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104. (...continued) explain the basis of the Court's action. Preston's stay application raised only one issue, however, and that was the claim that failed to secure a stay in *Bundy*. *See infra* notes 89-117 and accompanying text. The "Question to be Presented" in Preston's eventual certiorari petition was:

> Whether the decision of the Florida Supreme Court refusing to apply this Court's holding in Caldwell v. Mississippi, 472 U.S. 320, 106 S.Ct. 2633 (1985), to the facts of Mr. Preston's case fundamentally and irreconcilably conflicts with the decisions of the United States Court of Appeals in Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987), *modifying on rehearing* Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), *cert. granted* Dugger v. Adams, 108 S.Ct. ___, 56 U.S.L.W. 3601 (1988); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc); and Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988) (en banc).

Application for a Stay of Execution Pending Review of Petition for a Writ of Certiorari to the Supreme Court of Florida, Preston v. Florida (No. A-216), 109 S.Ct. 28 (1988) (copy on file with author).

The Court granted the stay in *Preston* on September 23, 1988.

105. Sawyer v. Smith, 110 S. Ct. 2822 (1990).

another Florida capital case.[106] That other case had been orally argued months before Bundy was to raise the virtually identical constitutional claim.

The constitutional issue, stripped of its legalistic garb, turned on whether Bundy's jury had been misled as to its central role in Florida's capital sentencing scheme. The backdrop of the issue was Florida's hybrid judge/jury sentencing structure, which created the danger that *no one* at the trial stage in Bundy's case, judge or jury, would have the real responsibility for making the decision that Bundy had lost his moral entitlement to live.[107] The jury did not have the full responsibility for the decision, since in Florida sentencing juries are--and are *told* that they are--

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106. The case, decided subsequent to Bundy's execution, was Dugger v. Adams, 109 S.Ct. 1211 (1989).

Soon after Bundy's execution, the Supreme Court decided *Adams*. The Court ruled against the inmate, Aubrey Adams, on procedural grounds and thus avoided the merits of the constitutional question presented by Adams as well as by Bundy.

Bundy's case was not burdened by the procedural defect that proved literally fatal in *Adams*. *See Bundy*, 109 S.Ct., at 849 (Brennan, J., dissenting from denial of stay) (explaining why Bundy's case presented no procedural bars foreclosing federal judicial review of the asserted constitutional defects in his sentence). However, retroactivity decisions rendered by the Court subsequent to Bundy's execution would have had the same effect as application of a procedural bar. Sawyer v. Smith, 110 S. Ct. 2822 (1990).

Adams was executed several weeks after the Supreme Court's procedural ruling in his case. Adams v. Dugger, 109 S. Ct. 1991 (1989) (order denying stay of execution).

107. *See generally* Mello, *Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes That Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C.L. Rev. 283 (1989) (analyzing why Florida's trifurcated capital sentencing scheme might violate the Constitution because it splits sentencing responsibility between judge and jury).

advisory only.[108] The jury renders a nonbinding recommendation of life or death, which the judge may follow or disregard. But the judge also does not have complete sentencing responsibility. The jury's recommendation of life or death carries tremendous weight, and it can be overridden by the judge only in those rare instances where no reasonable jury could have done what that jury did.[109] As a result of this division of sentencing responsibility, both jury and judge could look to the other as the *real* decisionmaker responsible for making the hard moral choices--with neither ever doing so.[110] When responsibility for a death sentence is divided, there exists the danger--identified by the Supreme Court in *Caldwell v. Mississippi*[111]

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108. *Id.* at 288-90 (describing Florida's jury override statutory scheme); Mello & Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 Fla. St. U.L. Rev. 31 (1985) (same); Radelet, *Rejecting the Jury*, 18 U.C. Davis L. Rev. 1409 (1985) (same).

109. Tedder v. State, 322 So.2d 908 (Fla. 1975); *see also* Cochran v. State, 457 So.2d 928, 933 (Fla. 1989); Mello, *The Jurisdiction to Do Justice*, ___ Fla. St. U. L. Rev. ___ (1991).

110. This is similar to the Private Slovik phenomenon: the idea that in a multi-layered system of sequential decisionmakers, someone, somewhere, sometime down the line of the process will make a "saving" decision. In Slovik's case, however, that somewhere/someone never made such a decision, and Slovik was executed. *See generally* W. Huie, *The Execution of Private Slovik* (1954).

111. Caldwell v. Mississippi, 472 U.S. 320 (1985) (prosecutor's and judge's comments to jury regarding appellate review held to constitute violation of eighth amendment). The Court recently held that *Caldwell* is not retroactive. Sawyer v. Smith, 110 S. Ct. 2822 (1990). It does not matter for purposes of this article, however, that ultimate relief under *Caldwell* would have been denied to Bundy. The point is that Bundy was treated differently. Other inmates raising *Caldwell* claims received stays. Bundy did not.

in a somewhat different, though analogous,[112] setting as a danger of constitutional magnitude--that *no one* bears the ultimate responsibility for this awesome life-or-death decision. The judge might defer to the jury and the jury defer to the judge, with the result that the defendant falls between the stools.

Thus, the sentencing structure that resulted in Bundy's death sentence divided responsibility between judge and jury. More importantly, Bundy's jury was *misled* as to the vital importance of its penalty decision. To cite one example of many, during jury selection the following exchange took place between the prosecutor and a prospective juror:

> [Prosecutor]: Do you understand that the judge, Judge Jopling, in this case, as the *trial judge, would have the ultimate responsibility for determining which punishment to impose?*
>
> [Prospective Juror]: Yes, I do.
>
> [Prosecutor]: In other words, *the jury would render an advisory opinion only, just that, an opinion.*
>
> [Prospective Juror]: Yes sir.[113]

Such admonitions by the prosecutor could well have led reasonable jurors to conclude -- incorrectly under Florida law -- that their sentencing recommendation would not carry much weight with the trial judge. Further, the prosecutor's statements were reinforced by the judge, who told the prospective jurors that the

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112. Mello, *supra* note 89, at 296-303.

113. Emergency Application, *supra* note 67, at 6 (emphasis added); *see also id*. at 6-10 (cataloguing many other examples).

jury's decision "is a recommendation only. *The law places the awesome burden upon the judge to decide what final disposition is made or penalty is imposed in a capital case.*"[114] The judge's sentencing instructions to the jury reinforced the legal misconception that "as you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge."[115]

At no time was Bundy's sentencing jury given the *accurate* information: that a jury recommendation of life imprisonment must be given great weight by the court and indeed must, save in the rarest of cases, be followed. Thus, (1) Bundy's sentencing jury was misled as to its role in Florida's trifurcated capital sentencing scheme, and (2) the misleading information was of a kind that tended to diminish the jury's sense of sentencing responsibility.

You may wonder: "So what? Should we *really* care if Bundy's jury had a diminished sense of the importance of its role or if sentencing responsibility was divided? *No* reasonable sentencer could possibly have sentenced the infamous Bundy to anything less than death." But recall that the Chi Omega jury, culled of all strong death penalty-opponents and marinated with relentless pretrial publicity, *did* for a time split 6-6 on whether to recommend death for Bundy.[116] Recall that the

114. *Id.* at 9 (emphasis added).

115. *Id.* at 9-10.

116. *See supra* note 32, and accompanying text.

prosecutors offered life pleas in both the Chi Omega and Kimberly Leach cases. Recall why: The evidence of Bundy's guilt was gossamer.[117]

Back to the story, however. On Friday, January 20, 1989--four days before the scheduled Tuesday morning execution and only hours after the Florida Supreme Court had denied a stay sought on other grounds--Coleman and Nelson decided to investigate seriously the diminished sentencing responsibility claim. I was to dictate a bare-bones statement of the abstract legal claim (devoid of record support, since at that point no one knew the depth of the basis of the issue in the trial record), to be included in a federal habeas corpus petition to be filed the next morning (Saturday) in the Orlando federal district court[118] before Judge G. Kendall Sharp.[119] Meanwhile, Coleman and Nelson would comb the massive trial transcript (in excess of 15,000 pages)[120] to bolster the diminished sentencing responsibility issue. Also

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117. *See supra* notes 35-36, 48-51, and accompanying text.

118. It is unclear how this issue could have been raised in the habeas petition, since as of that time the issue had never been presented to the state courts and thus was an unexhausted claim. *E.g.*, Vasquez v. Hillary, 474 U.S. 254 (1986); Rose v. Lundy, 455 U.S. 509 (1989) (exploring exhaustion rules requiring that claims must be presented to state courts before being presented to federal courts). Perhaps the state waived exhaustion. In any event, the federal courts in *Bundy* seemed untroubled by this comity difficulty.

119. This was subsequent to Judge Sharp's congressional testimony focusing on Bundy, cited *supra* at note ___. I do not know if Coleman and Nelson moved for Judge Sharp's recusal.

120. Emergency Application for Stay of Execution to Preserve Jurisdiction Pending Filing and Disposition of Petition for Writ of Certiorari [to the United States Court of Appeals for the Eleventh Circuit], at 7, Bundy v. Dugger, 109 S. Ct. 887 (1989) (copy on file with author).

on Friday, Bundy began meeting with police detectives from several states reportedly to confess to crimes,[121] apparently in the belief (and against Coleman's advice) that confessions would delay the execution. These confessions received substantial media attention.

On Saturday morning, I received an unexpected telephone call from Michael Radelet, a pro bono paralegal[122] working with Coleman. Bundy had asked, through Radelet, for my thoughts or advice about his case and its likely course over the next few days. Bundy had been meeting with detectives, and he apparently had told them that he had murdered many women since the mid-1970's. My messages to Bundy were blunt and threefold: "shut up; shut the fuck up; and shut the fuck up right now." Bundy's confessions were devastating to his case.[123] Significantly, he

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121. S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 329, 333, 334-42, 343-44, 346-52; A. Rule, *supra* note 5, at 474-88.

122. Radelet, a professor of sociology and criminology at the University of Florida, was working on Bundy's behalf as a pro bono paralegal.

123. Michaud and Aynesworth reported that Coleman had counselled Bundy not to speak with law enforcement representatives. *See* S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 332, 342. This may not be quite accurate. Coleman clearly *did* tell Bundy not to confess in the glare of national publicity, regardless of the general wisdom of cooperating with law enforcement representatives. Rule was probably closer to the truth when she wrote that "Coleman said he was aware that there was the possibility of a deal to delay -- confessions for time -- but that he was not involved in it, and would not comment." A. Rule, *supra* note 5, at 489.

Notwithstanding the clear legal advice to Bundy, his question and my answers were profoundly troubling. It felt like probing the outer limits of the adversarial system. On the one hand, who was a lawyer to tell Bundy not to confess if confession salved his soul and made things right with his god? And as a citizen, I (continued...)

had a legal case to devastate, a strong constitutional claim that should, in a rational and calm world, result in a stay in his case as it had in others. For a time Bundy ceased the confessions, but by the following evening he had resumed his meetings with police.

Bundy's lawyers filed the stay application and habeas petition in federal district court at 8:50 a.m. on Saturday morning. District Judge Sharp held an evidentiary hearing on one of Bundy's claims, beginning at 9:00 a.m.[124] The hearing lasted 40 minutes and concluded at about 9:40 a.m. The court issued its decision, denying all requested relief, initially from the bench and subsequently in a 17 page opinion issued at two minutes past noon. The denial was no surprise, given Judge

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123. (...continued)
was pleased that Bundy's confessions might be closing cases and, perhaps, giving the victims' families the sense of closure necessary for people to get on with their lives.

On the other hand, the confessions, even if factually untrue, were sabotaging his case in the courts. The confessions -- or more precisely the *manner* in which he was giving them in the limelight of publicity -- were offensive. It looked as though he was trading on the bodies of his victims to prolong his own life. Judges are human, I told Bundy through the paralegal, and they will be revolted by the circumstances under which the confessions were being made. Such revulsion must have influenced the judicial decisions affecting Bundy's life.

124. This claim alleged that the sentencing judge had received improper, *ex parte* information. S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 333-34 (discussing issues raised in stay application), 336, 342-43 (discussing evidentiary hearing). The issue was unrelated to the diminished sentencing responsibility issue.

Sharp's previous congressional testimony about Bundy's cases.[125] Coleman and Nelson immediately filed in district court a notice of appeal to the Eleventh Circuit.[126]

The Eleventh Circuit gave Bundy's lawyers two hours to file a brief.[127] By the magic of fax machines,[128] they filed it on time. The three judges (who had their chambers in three different cities)[129] conferenced by telephone.[130] Bundy seemed safe for the night. He had raised a powerful constitutional claim, the record was massive, and surely the court would need some time to sort it out correctly.

In fact, the Eleventh Circuit~~[131]~~ unanimously denied a stay late Saturday evening.[132] The Supreme Court was now the last remaining hope, and ~~the~~ Bundy's lawyers spent Sunday crafting the diminution of sentencing responsibility claim and buttressing it with quotes from the trial transcript as they found them. Full review of the trial record revealed that the issue was far stronger than previously dreamed --

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125. *See supra* note ___. I do not know whether Bundy's attorneys moved to recuse Judge Sharp based on the bias revealed in the judge's congressional testimony.

126. The facts outlined in this paragraph come from Emergency Application, *supra* note 100, at 5; *see also* S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 342-43.

127. S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 343.

128. *Id.*

129. Judge Thomas Clark has his chambers in Atlanta, Georgia; Judge Frank Johnson in Montgomery, Alabama; the late Judge Vance in Birmingham, Alabama.

130. S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 343.

~~131.~~ The Eleventh Circuit, contrary to its customary practice, never published an opinion explaining its decision to deny the stay.

132. Emergency Application, *supra* note 100, at 6.

considerably stronger than in the cases that had previously received stays on the basis of the claim. Bundy raised the issue in stay papers filed in the Florida Supreme Court and the United States Supreme Court.[133]

Monday we waited. While Coleman and Nelson were en route to the prison to visit Bundy,[134] I became the contact person for the Florida Supreme Court and the United States Supreme Court. Bundy lost in the Florida Supreme Court at approximately 6:00 p.m.,[135] but on balance the news was hopeful. Although the Florida Supreme Court rejected the diminished sentencing responsibility claim, it had done so based on the merits of the issue. The court had not applied a procedural bar to preclude consideration of the claim's merits. Since the state court had decided the issue on its merits, the federal courts would be expected to do so as well.[136]

I activated and so filed a previously-lodged stay application in the United States Supreme Court. The only issue before the Supreme Court was the diminished sentencers' responsibility argument. The mood among Bundy's lawyers

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133. Procedurally, the issue was raised as an original habeas corpus petition in the Florida Supreme Court. The application presented to the United States Supreme Court sought a stay of execution pending the filing and disposition of a certiorari petition requesting review of the Eleventh Circuit's decision.

134. Due to prison miscommunications, Coleman was not permitted to visit Bundy on the eve of the execution. Nelson did meet with Bundy at that time.

135. Atypically, the Florida Supreme Court published no opinion explaining its decision to deny the stay.

136. *E.g.*, Wainwright v. Greenfield, 474 U.S. 284, 289 n.3 (1986).

was guardedly nonpessimistic, but as the night dragged on the pessimism increased. The Court was taking too long. A stay would have come early, if Bundy had had the requisite five votes.

At 10:30 p.m., I called the Supreme Court's clerk's office to check in. The deputy clerk said to remain on the line, since a decision by the Court appeared imminent. The deputy clerk and I made small talk for the next five minutes. We talked about the weather in D.C. and the weather in Vermont.

After momentarily putting me on hold, the deputy clerk told me that Bundy had been denied a stay by a razor-thin vote of 5-4.[137] He read me Justice Brennan's dissent.[138] But the backbeat of harsh reality was relentless. Bundy had lost by *one vote* in the *Rehnquist* Court, on the claim that had been identified by us a mere three days earlier and meaningfully investigated only the day before--the diminished sentencing responsibility issue.

It was over. There would have been no point in filing a certiorari petition, which, under the "rule of four," requires only four votes to grant; a stay, by contrast, requires five votes. The justices would not have considered a certiorari petition until the Court's next regularly scheduled conference.[139] By then Bundy would already have been dead, and the Court would have dismissed the certiorari petition as moot.

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137. Bundy v. Dugger, 109 S.Ct. 887 (1989).

138. Bundy v. Dugger, 109 S. Ct. 887, 888 (1989) (Brennan, J., dissenting). Justices Marshall, Blackmun and Stevens also voted to grant the stay. *Id.*

139. *See generally* Revesz & Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. Pa. L. Rev. 1067 (1988).

I telephoned the prison with the news but was not permitted to speak with Bundy. Regulations. He was in a meeting. The message presumably was relayed to him.

Bundy was executed shortly after 7:00 a.m. the following morning, on schedule. James Coleman witnessed the killing of his client.[140] Outside the death chamber, much of Florida rejoiced. As one reporter described the tailgate party atmosphere:

> Ted Bundy went out with a cheer.
>
> Across Florida, radio stations bade "Bye, Bye, Bundy," while next door to the Chi Omega sorority, where Bundy killed two young women, a campus bar was offering "Bundy fries" and "Bundy fingers" -- actually, french fries and strips of alligator meat.
>
> At the Florida State Prison [in the town of Starke, where Bundy was killed], Ted Bundy haters arrived by the hundred as a traffic jam snaked across State Road 16 from Starke. The field across from the prison, where people were hawking pins of the electric chair and offering coffee and doughnuts, had all the trappings of a late-night county carnival.
>
> Except it was a chill dawn morning, and the reason for gathering was darker than any fair. Take the signs.
>
> "Chi-O, Chi-O, it's off to Hell I go," read one, referring to the sorority murders.
>
> "Bundy BBQ," read another.

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140. Rule, who was not present, wrote that immediately before Bundy's execution "Ted's flat eyes locked onto Jim Coleman and Reverend [Fred] Lawrence and he nodded . . . . 'Jim, Fred,' he said. 'I'd like you to give my love to my family and friends.'" A. Rule, *supra* note 5, at 493; *see also* S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 356-57.

As the crowd gathered, [radio station] Q-Zoo deejay Cleveland Wheeler was back in Tampa Bay pouring Jolt Cola and playing uncharacteristically uncommercial songs for the occasion -- including Peter Gabriel's *Shock the Monkey*. Then, when word from the prison arrived, Wheeler put on Eddy Grant's churning *Electric Avenue*. Simultaneously in Starke, revelers set off fireworks and sang a chorus of "Na Na Na Na, Na Na Na Na, Hey, Hey, Goodbye."[141]

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141. Koff, *Revolted by Bundy's Life, People Celebrate His Death*, St. Petersburg (Fla.) Times, Jan. 25, 1989, at 4A, col. 1. *See generally* Caputi, *supra* note 14, at 446; Paredes & Purdum, *Bye-Bye Ted: Community Response in Florida to the Execution of Theodore Bundy*, 2 ANTHROPOLOGY TODAY 9 (April 1990). Margaret Vandiver, a criminologist working pro bono as a paralegal, witnessed the events outside the prison and ~~described~~ characterized the scene as

> terrible and entirely banal at the same time. It was like being at the county fair, if you didn't know what was going on. There were so many cables crossing the ground that it was hard to walk. Generators made a lot of noise and there were large vans and trucks parked at different angles. There were several satellite dishes, and people were milling around in large groups.
>
> Before the execution and during it I tried to ignore everything, protesters, celebrators, media. I left the crowds and went over to the fence at the east of the field. It was a perfect winter dawn. I tried to concentrate on Ted and not on the hysteria in the field. I noticed one man walking, alone, along the fence. He seemed very sad, and I wondered if he might be a relative of a victim. I saw him again when Dennis [Adams, *see supra* note 87] was killed a few months later, walking slowly and alone by the fence, with the sun coming up behind him.
>
> When a reporter left the prison and waved a white handkerchief, [indicating that Bundy was dead] the crowd began singing and cheering. I tried then to turn myself into a video recorder. I left the area of the protestors and went to the section where the pro execution crowd gathered, and walked back and forth through the area, trying to remember everything. But it's hard now to remember, and even harder to write. It breaks language. The jeering faces were familiar: Brueghel's painting of the mocking of Christ, some of Bosch's work. People were selling doughnuts and coffee. There were beer cans on

(continued...)

Anthropologists Paredes and Purdum, astute observers of the subtexts of executions,[142] viewed the Bundy carnival as a false catharsis of a classic sort -- 'purging ourselves,' in the words of one columnist.[143] The European witchcraze comes to mind, the torture and murder of between 200,000 and nine million women in the cause of "purifying the body of Christ," as Mary Daly put it.[144] Margaret Vandiver, a thoughtful criminologist who worked as a pro bono Bundy paralegal and who witnessed the scene outside the prison following Bundy's execution, described what she saw as "something very ancient, and the modern setting only made it more bizarre. The ritual which was being repeated had elements of human sacrifice, of placing the sins of all on one victim and killing him, of celebratory lynching mobs

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141. (...continued)

> the ground. At least one person had constructed a model electric chair, and a full sized effigy of Ted, and was carrying them around in the back of a pick up truck. There were little pins or models of the electric chair being sold. People had signs, sparklers, firecrackers.

Memorandum from Margaret Vandiver to Michael Mello, April 1, 1990, at 1 (copy on file with author).

142. *E.g.*, Purdum & Paredes, *Rituals of Death: Capital Punishment and Human Sacrifice*, in FACING THE DEATH PENALTY (M. Radelet ed. 1989).

143. Paredes & Purdum, *supra* note 120, at 10.

144. M. Daly, *Gyn/Ecology: The Metaethics of Radical Feminism* 178 (1978); *see also* S. Booth, *The Witches of Early America* (1975); J. Caputi, *supra* note 14, at 96-101; H. Trevor-Roper, *The European Witchcraze of the Sixteenth and Seventeenth Centuries* (1967); H. Midelfort, *Witch Hunting in Southeastern Germany* (1972).

and of public executions.[145] All of these probably have their roots in the attempt to control the fear of death through ritually imposing it on one selected victim."[146]

Bundy's story did not end with his death, though. Three days after he was killed, the Eleventh Circuit stayed by unpublished order a scheduled Florida execution in another case. The sole basis of the stay was the diminished sentencing responsibility issue that had come within one vote of securing a Supreme Court stay for Bundy.[147]

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145. *E.g.*, A Koestler, *Reflections on Hanging* 9 (1957); J. McCafferty, *Capital Punishment* 9 (1972); N. Teeters, *Hang by the Neck* 33 (1967).

146. Memorandum, *supra* note 120.

147. Clark v. Dugger, No. 89-3065 (11th Cir. Jan. 27, 1989) (unpublished order granting stay of execution and certificate of probable cause to appeal, limited to the sentencer's responsibility issue) (copy on file with author). The court's unpublished order, date-stamped January 27, 1989, reads in its entirety:

> BY THE COURT:
>
> Certificate of [probable] cause [to appeal] is GRANTED but limited to petitioner's claim based on Caldwell v. Mississippi, 472 U.S. 320 (1985).
>
> Briefing is stayed pending the decision of the Supreme Court in Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987), *cert. granted, sub nom.* Dugger v. Adams, 108 S.Ct. 1106 (1988).
>
> The execution of petitioner is ORDERED stayed pending further order of this court.

Id. The court ultimately rejected Clark's *Caldwell* claim. Clark v. Dugger, 901 F.2d 908 (11th Cir.), *cert. denied* 111 S. Ct. ___ (1990). Clark was executed on November 14, 1990. Clark v. Dugger, 111 S. Ct. ___ (1990) (order denying application for stay of execution).
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(continued...)

Soon after Bundy was killed, his habeas petition in the Chi Omega case was dismissed as moot.

III. The Mirror, the (Mixed) Metaphor: Bundy as Cultural Construction

> This is the story of how we
> begin to remember[148]

> A man with vision. A man with
> direction. A prophet of our
> times . . . Bundy: The man,
> the myth, the legend[149]

The foregoing discussion demonstrated that a yawning gap exists between the "super due process" public perception and the "minimal due process" legal reality of Bundy's attempts to stay alive. This section suggests that the gap can be explained, at least in part, by the fact that Bundy became a symbol for death row and a metaphor of whom the United States wants to execute. Specifically, this

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147. (...continued)
Like Bundy, Clark raised the *Caldwell/Adams* issue for the first time in a successive habeas petition.

One Eleventh Circuit judge, the late Robert Vance, sat on both the *Bundy* and *Clark* panels.

148. P. Simon, *Under African Skies*, on *Graceland*, Warner Bros. Records (1986).

149. This quotation is from a poster publicizing a program showing a tape of Bundy's final interview. The tape was presented by a student group at the University of New Mexico in April 1989. The source of the quote and its origin is Caputi, *The Sexual Politics of Murder*, 3 Gender & Society 437, 446 (1989).

section shows the complexity of answering two related and superficially straightforward questions: *why* did Bundy come to symbolize death row, and precisely *what* does he symbolize? The section makes no pretense of answering these questions completely. Its modest thesis is that the explanations are not as simple as one might expect.

Bundy has become the symbol of death row for the cultural consciousness of the United States.[150] For this generation, Bundy rivals Hitler and Eichmann as personifications of evil and, therefore, as the embodiment of who should be on death row. He touched a nerve.

The mythic Bundy energizes death penalty supporters, and he makes death penalty opponents squeamish and defensive. Capital punishment advocates gleefully cite Bundy as the ultimate justification for the ultimate sanction. And if bad cases made bad causes, then Bundy is a recurring nightmare for people advocating abolition of the death penalty. I have heard colleagues who stridently believe in the abolition of capital punishment murmur that in their heart of hearts they might make an exception for Bundy.[151] Such death penalty opponents take care to distance

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150. *See supra* notes 5-11 and accompanying text.

151. Three years before Bundy was executed, I attended a conference of death row's advocates. After several speakers used Bundy as a foil ("in dealing with the media, be sure to show that while the crime in your case was bad, your client was no Ted Bundy," for example), Polly Nelson, one of Bundy's postconviction lawyers, brought the assemblage to an uncomfortable silence by reminding the audience that even Bundy had people who cared about him and that it was inappropriate to suggest that Bundy ought to be put to death.

their abolitionist sentiments from Bundy, scrupulously pointing out that most capital cases are not nearly so heinous.[152]

On one level, Bundy appears an unlikely candidate for death row's symbol. Bundy and his cases are strikingly atypical of capital inmates and their cases generally. Unlike most death row inmates, Bundy was a relatively bright,[153] articulate, middle class, well-educated (college degree and one year of law

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152. Coleman, *supra* note ___, at 15 ("If ever the death penalty were warranted, even some lifelong opponents of capital punishment agreed, Ted Bundy would have been an appropriate candidate for execution").

153. Bundy reportedly graduated from the University of Washington with a 3.51 grade point average. A. Rule, *supra* note 5, at 36. At least some of his teachers thought very well of him. *Id.* at 19 (quoting a letter from a psychology professor placing Bundy in "the top 1% of undergraduate students with whom I have interacted both here at the University of Washington and at Purdue University. He is exceedingly bright, personable, highly motivated, conscientious"). Bundy won a scholarship to Stanford University to study Chinese for a summer, but he performed poorly. *Id.* at 15.

Rule consistently referred to him as "brilliant." *E.g.*, *id.* at i, 3, 28, 72, 155, 396. Larsen called him "bright," *e.g.*, R. Larsen, *supra* note 4, at 12, 293, and observed that his academic record in high school and college was erratic. *Id.* at 108-9. Michaud and Aynesworth concluded that Bundy was "only middling bright (IQ 124)," also pointing to Bundy's mixed academic career. S. Michaud & H. Aynesworth, *supra* note 5, at 7, 56-59, 66-67, 711. "The image of brilliance owes much to the newspeople who fostered it. Ted made very good copy." *Id.* at 252.

"Brilliant," "bright," or simply cognitively unimpaired, Bundy was different from most death row inmates. *See infra* note 132.

school),[154] physically attractive[155] and charming[156] white man[157] who was apparently

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154. Most death row inmates grew up in poverty. The American Bar Association calculated that 99% of condemned inmates are indigent. *See Death Row Inmates Can't Find Lawyers*, 73 A.B.A. J. 58, 58 (Jan. 1, 1987); *see also* H. Bedau, *The Death Penalty in America* 187-88 (1982).

Many death row inmates are illiterate, retarded and/or mentally ill. *E.g.*, Hooks v. Wainwright, 536 F. Supp. 1330, 1337-38 (M.D. Fla. 1982) (more than half of Florida's inmates were functionally illiterate, and 22% of the total inmate population had an IQ of less than 80 -- which is considered to be borderline retarded); Lewis, *Killing the Killers, A Post-Furman Profile of Florida's Condemned*, 25 Crime and Delinquency 200, 211 (1979) (estimating that the mean education of Florida's condemned population was approximately a ninth grade level, and that 15% of the inmates had an IQ of less than 90); Jacob & Sharma, *Justice After Trial*, 18 Kansas L. Rev. 493, 508-510 (1970) (intelligence and educational levels among prisoners as a group are very low); Note, *Prison "No Assistance" Regulations and the Jailhouse Lawyer*, 1968 Duke L. J. 343, 347-48 and app. (same); Bluestone & McGahee, *Reactions to Extreme Stress: Impending Death by Execution*, 119 Am. J. Psychiatry 393, 393 (1962) (study finding that none of the 19 condemned inmates on Sing Sing's death row had an education beyond the tenth grade and that some were illiterate); Ream, *Capital Punishment for Mentally Retarded Offenders*, 19 Sw. L. Rev. 89, 112-113 (1990) ("Current research [as of 1989] indicates that possibly as many as 250 of the [then] 2,000 people on death row in the United States are mentally retarded. Other research shows that since the death penalty was reinstated in 1976, at least 5 of the 70 people executed [between 1977 and 1986] were arguably retarded"); Blume & Bruck, *Sentencing the Mentally Retarded to Death*, 41 Ark. L. Rev. 725, 725 n.4 (1988) (same); Blume, *Representing the Mentally Retarded Defendant*, The Champion, Nov. 1987, at 32 (same); Reid, *Unknowing Punishment*, 15 Student Lawyer 18, 23 (May 1987) (discussing retarded inmates who have been executed); Lewis, Pincus, Feldman, Jackson and Bard, *Psychiatric, Neurological and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 14 Am. J. Psychiatry 838, 840-44 (1986) (discussing mental illness among certain death row inmates); Lewis, Pincus, Bard, Richardson, Prichep, Feldman & Yeager, *Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 Am. J. Psychiatry 584 (1988).

155. Larson wrote that Bundy "had the good looks of an actor." R. Larsen, *supra* note 4, at 131; *see also id.* at 133. Rule repeatedly called Bundy "handsome." A. Rule, *supra* note 5, at 28, 29, 396.

(continued...)

not the victim of childhood sexual abuse.[158]

Bundy *seemed* so . . . relentlessly middle class. He appeared to have a promising future. By his late-twenties, Bundy had done well in college[159] and poorly in law school.[160] He was a rising star within the Seattle Republican party.[161] He did

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155. (...continued)

The recent movie *Dick Tracy* reinforces the idea that Western culture associates badness with physical deformity. Michaud and Aynesworth referred to the "hunchback" lurking beneath Bundy's facade of normality. S. Michaud & H. Aynesworth, *supra* note 5, at 6. Similarly, Carl Sutcliffe, upon being told that his brother was the "Yorkshire Ripper" (who killed and mutilated 13 women in England between 1975 and 1980), remarked: "I imagined [the killer] to be an ugly hunchback with boils all over his face, somebody who couldn't get women and resented them for that. Somebody with totally nothing going for him." D. Cameron & E. Frazer, *supra* note 14, at 35.

The powerful popular stereotype -- of the sexual murderer as physical beast -- is "an important means by which the extraordinary acts of sexual killers can be slotted into our response to cases of sexual murder." *Id.*

156. Many encountering Bundy remarked on his urbanity and apparent intelligence. Immediately before pronouncing a sentence of death upon Bundy, Florida judge Edward Cowart said: "You're a bright young man. You'd have made a good lawyer. I'd have loved to have you practice in front of me . . . Take care of yourself." R. Larsen, *supra* note 4, at 321; *accord* A. Rule, *supra* note 5, at 394. Judge Cowart then added: "But you went the wrong way, pardnuh." *Id.*

157. The relevance of Bundy's race and gender are discussed *infra* at notes 145-98 and accompanying text.

158. My experience was that in addition to poverty, the single most pervasive characteristic of death row inmates was that they were victims of childhood sexual abuse. *E.g.*, Lewis, Pincus, Bard, Prichap, Feldman & Yeager, *supra* note 132, at 586-87; Feldman, Mallouh, Lewis, *Filicidal Abuse in the Histories of 15 Condemned Murderers*, 15 Bull. Am. Acad. Psychiatry & L. 345 (1986).

159. *See supra* note 131.

160. R. Larsen, *supra* note 4, at 43; A. Rule *supra* note 5, at 122, 138.

volunteer work, writing a rape prevention pamphlet for women.[162] As a college student he worked on a crisis hotline.[163] These mainstream attributes set Bundy apart from almost all other people living on death row.

Part of the explanation for Bundy's symbolizing death row despite his atypicality lies in his savvy ability to attract and manipulate media attention. Bundy knew how to make himself noticed. His jaunty affect before the television cameras,[164] and his intuitive grasp of the sound bite, made Bundy ripe for stardom as a *bete noir*.

More important was his very *atypicality* to death row--and its converse, Bundy's *recognizability* by the dominant culture in this country. Bundy's recognizability as "one of us"[165], "everyman's son," the "boy next door," made him singularly threatening and feared. This phenomenon is reflected in the titles of

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161. (...continued)

161. *Eg.*, R. Larsen, *supra* note 4, at 4-12, 109-110; S. Michaud & H. Aynesworth, *supra* note 5, at 61-65, 68-70; A. Rule, *supra* note 5, at 33-34, 39; *see also* A. Rule, *supra* note 5, at 101-102 (quoting a letter from the former governor of Washington state to the admissions committee of the University of Utah Law School, summarizing Bundy's "outstanding" performance as a member of the governor's campaign staff); *id.* at 33-34, 39; R. Larsen, *supra* note 4, at 44 (same). Larsen thought Bundy might someday run for public office. R. Larsen, *supra* note 4, at 11-12, 127-28.

162. J. Caputi, *supra* note 14, at 47.

163. R. Larsen, *supra* note 4, at 109; A. Rule, *supra* note 5, at 23-32.

164. His trial was the first to be televised. Coleman, *supra* note ___.

165. The terms "one of us", "our," or "we," refer to the dominant culture, *ie.*, male gender, white race, comparatively affluent class. *See infra* notes 145-98 and accompanying text (discussing relevance of gender and race in thinking about Bundy).

books written about him: *The Stranger Beside Me, The Killer Next Door, The Phantom Prince*.[166] Bundy mirrored the United States' worst nightmares.

Race factored into his recognizability by the dominant culture in the United States. It is paradoxical, though unsurprising, that death row's symbol should be white. The pervasiveness of racism in this country requires no citation, and its persistence in the capital punishment system should be expected and has been documented[167] though trivialized by the courts as constitutionally insignificant.[168]

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166. *See supra* note 5. Caputi wrote in a similar vein of London's Jack the Ripper. *See* J. Caputi, *supra* note 14, at 17.

167. Georgia has been the most heavily studied United States' jurisdiction. The most accessible yet sophisticated treatment of the Georgia data is Gross, *Race and Death*, 18 U.C. Davis L. Rev. 1275 (1985). For studies of Georgia and other jurisdictions, *see* D. Baldus, G. Woodworth, & C. Pulaski, *Equal Justice and the Death Penalty* (1990); W. Bowers, *Legal Homicide* (1984); S. Gross & R. Mauro, *Death and Discrimination* (1989); Baldus, Woodworth & Pulaski, *Arbitrariness and Discrimination in the Administration of the Death Penalty*, 15 Stetson L. Rev. 133 (1986); Baldus, Woodworth & Pulaski, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons From Georgia*, 18 U.C. Davis L. Rev. 1275 (1985); Baldus, Woodworth & Pulaski, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. Crim. L. & Criminology 661 (1983); Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. Crim. L. & Criminology 1067 (1983); Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing*, 37 Stan. L. Rev. 27 (1984); Jacoby & Paternoster, *Sentence Disparity and Jury Picking*, 73 J. Crim. L. & Criminology 379 (1982); Johnson, *Selective Forces in Capital Punishment*, 36 Social Forces 165 (1957); Keoniger, *Capital Punishment in Texas, 1924-1968*, 15 Crime & Delinquency 132 (1969); Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty*, 18 Law & Society Rev. 437 (1984); Paternoster, *Race of the Victim and Location of the Crime*, 74 J. Crim. L. & Criminology 754 (1983); Paternoster & Kazyaka, *Racial Considerations in Capital Punishment*, in Challenging Capital Punishment (K. Haas & J. Inciardi eds. 1988); Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 Am. Sociological Rev. 46 (1981); Radelet & Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 Law & Society
(continued...)

167. (...continued)
Rev. 918 (1985); Smith, *Patterns of Discrimination in Assessments of the Death Penalty*, 15 J. Crim. Justice 279 (1987); Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 Harv. L. Rev. 456 (1981).

These studies quantify the different ways in which the criminal justice system responds to white murder *victims* and Black murder victims. The Baldus study of capital sentencing patterns in Georgia, for example, showed that a person of any race who has been convicted of murder is far more likely to be condemned if the victim was white than if the victim was of any other race. Killers of whites receive the death penalty in 11 percent of these cases, but only one percent of those who murder Blacks are sentenced to die. If the murderer is a Black and the victim white, the killer will receive the death penalty 22 percent of the time -- but if a Black kills another Black that figure drops to 1 percent. Even allowing for 230 other variables, the death sentence was four times more likely to be imposed when the victim was white. Gross put these numbers into common sense context: "Smoking cigarettes increases the risk of death by heart disease greatly, but by a considerably smaller amount than the race-of-victim effects" revealed by the Baldus study. Gross, *supra* at 1308.

The statistics contained in the various studies are important evidence of racism, but they also create a potential danger. There is something numbing about all this ciphering, something clinically obscene about factoring in the color of a victim's skin in deciding life or death. Inquiries like the Baldus study merely quantify what every actor in the criminal justice system worth her salt knows: Race matters in deciding who dies.

168. *E.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987) (purporting to accept as valid studies demonstrating discrimination of Georgia capital sentencing patterns, but finding no constitutional significance in the statistical disparities shown by the studies). The Court's decision in *McCleskey* was "immediately beset by sharp criticism and, in some instances, outright denunciation." Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1388, 1389 (1989) (collecting examples). The *McCleskey* decision was critiqued in D. Baldus, G. Woodworth, & G. Pulaski, *supra* note 145; S. Gross & R. Maruo, *supra* note 145; Johnson, *Unconscious Racism in the Criminal Law*, 73 Cornell L. Rev. 1016 (1988); *Supreme Court, 1986 Term*, 101 Harv. L. Rev. 119, 155-59 (1987); Carter, *When Victims Happen to be Black*, 97 Yale L.J. 420 (1988); Holland, *McCleskey v. Kemp: Racism and the Death Penalty*, 20 Conn. L. Rev. 1029 (1989); Mikel, *McCleskey v. Kemp: Whether Georgia's Capital Punishment Statue is a Vehicle for Discrimination*, 1988 Detroit Coll. L. Rev. 1029 (1988).

Blacks represent 10 percent of the total United States' population. Yet of the 3,589 people put to death for all crimes between 1930 and 1972, 54.6 percent were Blacks or members of other minority groups.[169] Statistics on execution for rape are even more dramatic. Of the 455 people put to death for the crime of rape between 1930 and 1977, 89.5 percent were nonwhite.[170]

These execution figures remained relatively constant over time, but their message changed as the culture of the United States redefined their significance. Throughout the history of capital punishment, peaking in the 1930's, few people gave the racial dimension of the death penalty process much thought. The 1960's civil rights movement transformed the culture's awareness of race. The national sense of unease that Blacks were bearing the brunt of executions increased apace.

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169. Wolfgang & Riedel, *Racial Discrimination, Rape, and the Death Penalty*, in CAPITAL PUNISHMENT IN THE UNITED STATES (H. Bedau & C. Pierce eds. 1976); *see also* Wolfgang & Riedel, *Rape, Race, and the Death Penalty in Georgia*, 45 AM. J. ORTHOPSYCHIATRY 658 (1975); Wolfgang, *Race, Judicial Discretion, and the Death Penalty*, 407 Annals of the American Academy of Political and Social Science 119 (1973); Partington, *The Incidence of the Death Penalty for Rape in Virginia*, 22 WASH. & LEE L. REV. 43 (1965) (finding that between 1908 and 1964, 41 men, *all* Blacks, were executed for rape in Virginia).

170. *Id.* The Supreme Court in 1977 held the death penalty unconstitutionally disproportionate for the crime of rape of an adult woman. Coker v. Georgia, 433 U.S. 584 (1977). An amici curiae brief filed by the American Civil Liberties Union and several women's rights organizations focused on the racial and gender aspects of the issue. Not one of the *Coker* opinions so much as referred to these dimensions of the case, stressing instead matters of proportionality.

Such unease manifested itself early in Florida. John Spenkelink, a run-of-the-mill killer if ever there was one,[171] became the first person executed under Florida's present-day capital statute.[172] Though the governor explained that

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171. Streib summarized Spenkelink's case:

> Spenkelink, raised on an Iowa farm, had a traumatic childhood. At the age of twelve, he personally found the body of his alcoholic father who had committed suicide. At age fourteen, his criminal record began with an arrest for driving a stolen car. His record grew to include armed robbery and escape from prison.
>
> In early 1972, Spenkelink began traveling around the country with Joseph J. Szymankiewicz, a hitchhiker Spenkelink had picked up. Having been forcibly sodomized and otherwise mistreated by Szymankiewicz, Spenkelink devised a plan to recover the personal property which Szymankiewicz had stolen from him and to terminate his relationship with his abusive companion. Following his plan, Spenkelink shot Szymankiewicz in the back while he was asleep in their motel room in Tallahassee, Florida on February 4, 1973.
>
> One week later, Spenkelink was arrested in Buena Park, California for armed robbery. A police search of the apartment in which he was arrested uncovered the handgun used in the Florida killing. Soon thereafter, Spenkelink was returned from California to Florida and tried for first degree murder. Convicted under a felony-murder statute for the robbery-killing of Szymankiewicz, he was sentenced to death on December 20, 1973.

Streib, *Executions Under the Post-Furman Capital Punishment Statutes*, 15 Rutgers L. J. 443, 450 (1983). Larsen characterized Spenkelink's crime as a "cruel, rather undistinguished murder." R. Larsen, *supra* note 4, at 295. For views on the Spenkelink execution, see Burt, *Disorder in the Court*, 85 Mich. L. Rev. 1741, 1805-13 (1987); Clark, *Spenkelink's Last Appeal*, The Nation, Oct. 27, 1979, at 385.

172. Five months after Furman v. Georgia, 408 U.S. 238 (1972) invalidated all extant death sentences nationally, a special session of the Florida legislature enacted a revised death penalty statute that the governor immediately signed into law. Fla. Stat. § 921.141 (1982 & Supp. 1990). For accounts of the frenetic activity that preceded the new statute, see Ehrhardt & Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?*, 64 J. Crim. L. & Criminology 10 (1973); Note,

(continued...)

Spenkelink went first because his case had been in the courts the longest,[173] speculation persists that race was an important consideration in Florida's New South governor's decision to sign Spenkelink's death warrant. One Miami attorney involved in Spenkelink's case wrote that "it was a widely-held belief among Mr. Spenkelink's attorneys and others who assisted in the litigation in his case that the extraordinary efforts by the state of Florida to have Mr. Spenkelink executed were

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172. (...continued)
Florida's Legislative and Judicial Response to Furman v. Georgia, 2 Fla. St. U. L. Rev. 108 (1974); Dyckman, *Our Legislature in Action: The Unwisdom of It All*, St. Petersburg (Fla.) Times, Dec. 3, 1973, at 12-B col. 1; *see also* Mello & Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U.L. REV. 31, 70 n.187 (1985) (describing frenzied conference committee discussions of jury override provision of Florida's revised capital punishment statute).

Florida's post-*Furman* statute was upheld in Proffitt v. Florida, 428 U.S. 242 (1976). The Georgia and Texas statutes were also upheld. Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976). The Florida, Georgia, and Texas statutes attempted to guide the capital sentencing decision by establishing a procedure to be followed in determining what penalty should be imposed upon conviction of a capital felony. *Gregg*, 428 U.S. at 196-98; *Proffitt*, 428 U.S. at 253; *Jurek*, 428 U.S. at 268-74. The Supreme Court invalidated the post-*Furman* statutes of North Carolina and Louisiana, which made the death penalty mandatory upon conviction of specified offenses. Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). *See generally* Weisberg, *Deregulating Death*, 1983 SUP. CT. REV.. 305 (analyzing 1976 cases deciding constitutionality of capital punishment).

Gary Gilmore and Jesse Bishop volunteered for execution by waiving legal challenges to their convictions and sentences. Gilmore was executed in 1977, Bishop in 1978. *See* Streib, *supra* note 149; *see also* N. Mailer, *The Executioner's Song* (1979) (describing Gilmore). Spenkelink, executed in 1979, thus was the first non-consensual execution in the post-*Furman* era. W. Bowers, *Legal Homicide* 427 (1984); W. White, *The Death Penalty in the Eighties* 55 (1987).

173. Sherrill, *Death Row on Trial*, N. Y. Times Magazine, Nov. 13, 1983, at 108-109.

prompted by two factors: the relatively non-heinous nature of his crime and the fact that Mr. Spenkelink was white, the theory of the state being that if Mr. Spenkelink could be executed, then everyone on death row would be destined for execution."[174]

In the same way that execution of whites insulates a criminal justice system susceptible to charges of being racist, so too does designation of Bundy as death row's symbol. Bundy's race reinforced his identification as a member of the dominant culture.

Beyond his physical attributes and background, Bundy was a creation of the culture in more subtle and troubling respects. The Bundy symbol is inseparable from matters of gender -- those characteristics imposed upon biological sex by acculturation and socialization.[175] This is because maleness is the one obvious trait

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174. Letter from Karen Gottlieb to Michael Mello, July 31, 1990 (copy on file with author). In 1979 Gottlieb, today one of the most highly respected appellate attorneys in Florida, was employed as an assistant public defender in Miami. She "had an opportunity many times to consult with the lawyers who represented Mr. Spenkelink in post conviction proceedings, including his attorney's in the litigation which immediately preceded his execution in May of 1979." *Id.*

Additional anecdotal evidence is sparse, but what little there is tends to reinforce Gottlieb's perceptions. For example, a journalist in 1983 quoted an anonymous central Florida lawyer as saying: "I'll tell you why they wanted to kill him [Spenkelink]. He was white. No one in the South wants to kill a black man first. They don't want to be labeled racist. I think the next person who gets it will also be white. And then it's watch out blacks." Sherrill, *supra* note 151, at 109. *Cf.* Zeisel, *supra* note 145 (observing that Florida prosecutors altered charging decisions in apparent attempts to influence results of statistical studies of racism in the capital punishment process).

175. Existing evidence strongly suggests that gender is socially constructed, not biologically determined. *E.g.*, R. Bleier, *Science and Gender* (1984); L. Davidson (continued...)

shared by all known serial sexual killers.[176] The remainder of this section draws upon feminist[177] scholarship,[178] notwithstanding its controversial reputation[179] and

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175. (...continued)
& L. Gordon, *The Sociology of Gender* 1-33 (1979); S. De Beauvoir, *The Second Sex* 1-47 (1953); A Fausto, *Myths of Gender* (1985); E. Keller, *Reflections on Gender and Science* (1985); S. Kessler & W. McKenna, *Gender* (1978).

176. "[T]here has never been a female [Yorkshire Ripper]. Women have committed very brutal murders; they have killed repeatedly; they have killed at random. But in all the annals of reported crime, no woman has done what [the Yorkshire Ripper] did." D. Cameron & E. Frazer, *supra* note 14, at 1. "Only men, it seems, are compulsive lone hunters, driven by a lust to kill -- a sexual desire which finds its outlet in murder." *Id.*; *see also id.* at 23-26, 144-48.

No such serial murderers occur in Ann Jones' history of female killers in the United States. *See* A. Jones, *Women Who Kill* (1980). Jones documented that "unlike men, who are apt to stab a total stranger in a drunken brawl or run amok with a high-powered rifle, we women usually kill our intimates: we kill our children, our husbands, our lovers." A. Jones, *supra* at xv; *see also* J. Levin & J. Fox, *Mass Murder* 53 (1985) ("It is obvious that certain types of mass killings -- for example, serial raping and murdering -- are the sole province of men"); H. Morneau & R. Rockwell, *Sex, Motivation, and the Criminal Offender* 223 (1980) (advising police that "the sadistic murderer is almost always male. Generally, do not waste time looking for a female").

177. To paraphrase Kaufmann's characterization of existentialism, feminism is less a unified philosophy than a label for several different revolts against traditional modes of thought -- including revolt against labeling. W. Kaufmann, *Existentialism From Dostoyevsky to Sartre* 11 (1975). For a sampling of self-consciously feminist works, *see, e.g.*, M. Atwood, *The Handmaid's Tale* (1985); M. Beard, *Woman as a Force in History* (1946); M. Belenky, *Women's Ways of Knowing* (1986); E. Broner, *A Weave of Women* (1982); K. Chernin, *Reinventing Eve: Modern Woman in Search of Herself* (1987); P. Chessler, *About Men* (1978); P. Chessler, *Women and Madness* (1981); J. Chicago, *The Dinner Party* (1979); J. Chicago, *The Birth Project* (1985); R. Coward & J. Ellis, *Language and Materialism* (1977); A. Cross, *Death in a Tenured Position* (1981); T. Dahl, *Women's Law: An Introduction to Feminist Jurisprudence* (R. Craig tr. 1987); M. Daly, *Beyond God The Father* (1976); M. Daly & J. Caputi, *Webster's First New Intergalactic Wickedary of the English Language* (1987); M. Daly, *Pure Lust* (1984); A. Davis, *Women, Race and Class* (1981); E. Davis, *The First Sex* (1971); *Feminist Scholarship: Kindling the Groves of Academe* (E. Du Bois ed.
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177. (...continued)
1985); A. Dworkin, *Our Blood: Prophecies and Discourses on Sexual Politics* (1976); *The Future of Difference* (H. Eisenstein ed. 1980); H. Eisenstein, *Contemporary Feminist Thought* (1983); J. Elshtain, *Public Man, Private Woman* (1981); T. Farley, *Oppression and the Politics of Culture* (1978); S. Firestone, *The Dialectic of Sex* (1970); B. Friedan, *The Feminine Mystique* (1983); J. Gallop, *The Daughter's Seduction: Feminism and Psychoanalysis* (1982); C. Gilligan, *In a Different Voice* (1982); C. Gilman, *Women and Economics* (1898); C. Gilman, *Herland* (1915); S. Griffin, *Woman and Nature: The Roaring Inside Her* (1978); S. Grimke, *Letters on the Equality of the Sexes and the Condition of Women* (1838); C. Heilbrun, *Toward a Recognition of Androgyny* (1980); C. Heilbrun, *Writing a Woman's Life* (1989); C. Heilbrun, *Hamlet's Mother and Other Women* (1990); C. Heilbrun, *Reinventing Womanhood* (1979); A Hochschild, *The Second Shift* (1989); F. Howe, *Women and the Power to Change* (1975); M. Humm, *Dictionary of Feminist Theory* (1990); E. Janeway, *Man's World, Woman's Place* (1971); *Men in Feminism* (A. Jardine & P. Smith eds. 1989); *Gender and Theory: Dialogues on Feminist Criticisms* (L. Kaufman ed. 1989); U. Le Guin, *The Dispossessed* (1975); G. Lerner, *Women in American History* (1971); G. Lerner, *The Creation of Patriarchy* (1986); A. Lorde, *The Black Unicorn* (1978); S. Maitland, *A Map of the New Country* (1983); J. Mitchell, *Psychoanalysis and Feminism* (1974); J. Mitchell, *Women: The Longest Revolution* (1984); E. Moers, *Literary Women* (1977); *Feminism/Postmodernism* (L. Nicholson ed. 1990); *Thinking Gender* (L. Nicholson ed. 1987); Noclin, *Why Have There Been No Great Women Artists?*, in *Women in Sexist Society* (V. Gornick & B. Moran eds. 1971); M. O'Brien, *The Politics of Reproduction* (1983); T. Olsen, *Silences* (1965); C. Ozick, *Metaphor and Memory* (1989); R. Parker & G. Pollack, *Old Mistresses* (1981); R. Parker, *Framing Feminism* (1987); M. Piercy, *Parti-Colored Blocks for a Quilt* (1982); M. Piercy, *Braided Lives* (1983); M. Pratt, *Crime Against Nature* (1990); D. Rhode, *Justice and Gender* (1989); A. Rich, *Your Native Land, Your Life* (1986); A. Rich, *The Dream of a Common Language: Poems 1974-1977* (1978); A. Rich, *On Lies, Secrets and Silence* (1978); A. Rich, *Of Women Born: Motherhood as Experience and Institution* (1973); R. Robson, *The Eye of the Hurricane* (1989); S. Rowbotham, *Hidden From History* (1973); S. Rowbotham, *Beyond the Fragments* (1979); P. Sanaday, *Female Power and Male Dominance* (1981); M. Sherfey, *The Nature and Evolution of Female Sexuality* (1973); E. Showalter, *A Literature of Their Own* (1977); B. Smith, *Toward a Black Feminist Criticism* (1980); D. Spender, *Man Made Language* (1980); D. Spender, *Women of Ideas* (1982); G. Spivak, *The Post-Colonial Critic: Interviews, Strategies, and Dialogues* (S. Harasym ed. 1990); G. Spivak, *In Other Worlds* (1987); E. Stanton, *The Woman's Bible* (1895-98); Starhawk, *The Spiral Dance* (1979); G. Steinem, *Outrageous Acts and Everyday Rebellions* (1983); Taub & Schneider, *Perspectives on Women's Subordination and the Role of*
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177. (...continued)
Law, in *The Politics of Law* 42 (D. Karyes ed. 1980); Vickers, *Memoirs of an Ontological Exile*, in *Feminism in Canada* (A. Miles & J. Fian eds. 1983); A. Walker, *The Color Purple* (1983); E. Wilson, *Women and the Welfare State* (1977); M. Wittig, *Les Guerilles* (1980); M. Wittig, *Lesbian Peoples: Material for a Dictionary* (1976); V. Woolf, *Three Guineas* (1938); V. Woolf, *To The Lighthouse* (1927); V. Woolf, *Orlando* (1928); Colker, *Feminist Litigation: An Oxymoron?*, 13 HARV. WOMEN'S L.J. 137 (1990); Coombs, *Crime in the Stacks, or a Tale of a Text*, 38 J. LEG. ED. 117 (1988); Dalton, *Where We Stand*, 3 BERKELEY WOMEN'S L. J. 1 (1987); Frug, *Re-Reading Contracts*, 34 AM. U. L. REV. 1065 (1985); Heilbrun & Resnik, *Convergences: Law, Literature and Feminism*, 99 YALE L.J. 1913 (1990); Homer & Shwartz, *Admitted But Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1 (1989-90); Karst, *Woman's Constitution*, 1984 DUKE L. J. 447; Kline, *Race, Racism and Feminist Legal Theory*, 12 HARV. WOMEN'S L. J. 1115 (1989); Littleton, *In Search of a Feminist Jurisprudence*, 10 HARV. WOMEN'S L. J. 1 (1987); Matta, *On Teaching Feminist Jurisprudence*, 57 REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO 253 (1988); Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987); Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education*, 38 J. LEG. ED. 61 (1988); Minow, *Feminist Reason*, 38 J. LEG. EDUC. 47 (1988); Mossman, *Feminism and Legal Method: The Difference it Makes*, 3 WISC. WOMEN'S L. J. 147 (1987); Phinney, *Feminism, Epistemology, and the Rhetoric of Law: Reading Bowen v. Gilliard*, 12 HARV. WOMEN'S L.J. 151 (1989); Rhode, *Gender and Discrimination*, 56 U. CINN. L. REV. 521 (1987); Robson, *Embodiment(s)(s): The Possibilities of Lesbian Legal Theory in Bodies Problematized by Postmodernisms and Feminisms*, ___ L. Rev. ___ (1991); Robson, *Lifting Belly*, 13 WOMEN'S RIGHTS L. REP. ___ (1991); Robson, *Lavender Bruises: Intra Lesbian Violence, Law, and Lesbian Legal Theory*, 20 Golden Gate L. Rev. ___ (1991); Robson, *Lesbianism in Anglo and European Legal History*, 6 WISC. WOMEN'S L. J. ___ (1990); Robson, *Winning and Losing in Las Vegas: The Politics of Lesbian Literary Awards*, 19 GAY COMMUNITY NEWS, No. 3, July 22-28, 1990, at 1; Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L. J. 25 (1987); Scales, *Towards a Feminist Jurisprudence*, 56 IND. L. J. 375 (1981); West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. Rev. 401 (1987); Wishik, *To Question Everything*, 1 BERKELEY WOMEN'S L.J. 64 (1985); *see also infra* notes 162, 164, 166, 172. This citation does not include a vast body of writings which are not self-defined as "feminist" but which "evince a feminist sensibility." Robson, *Evincing a Feminist Sensibility: Reviews of Women's Fiction and Women's Poetry*, 5 KALLIOPE, No. 1, at 65 (1983).

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notwithstanding some hesitation.[180] First and most importantly, such scholarship -- and *only* such scholarship -- recognizes the centrality of gender to any meaningful

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177. (...continued)

The foregoing string cite includes an enormously diverse group of texts written by people of widely disparate political philosophies, sexual orientations, races, classes, cultural contexts, and personal backgrounds. The list includes works of philosophy, theology, mythology, linguistics, history, sociology, visual art, science, aesthetics, weaving, sociology, social theory, poetry, politics, political theory, literary criticism, law, jurisprudence, prose (novels and short stories), and educational theory. This loads quite a bit upon a single "*see, e.g.*," citation, and such is intentional. The point is to show the omnipresence of feminism.

Feminism is everywhere, but it is not monolithic. Bender is correct that labels and categorization should be resisted as divisive. Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEG. ED. 3, 5 n.5 (1988). "As soon as labels are imposed, stereotypes and preconceived ideas become fixed instead of remaining fluid and growing." *Id.* This article thus does not subdivide feminism into radical feminism, Black feminism, Hispanic feminism, liberal feminism, Marxist feminism, socialist feminism, lesbian feminism, etc.

178. There is, of course, a large body of traditional literature on these and related topics. *E.g.*, R. Ressler, A. Burgess & J. Douglas, *Sexual Homicide: Patterns and Motives* (1987); J. Levin & J. Fox, *supra* note 154. This mainstream literature has not proven helpful in illuminating the themes developed in this article. As discussed in the text, any intelligible discussion of sexual murder or serial murder must bring questions of gender to the fore. Traditional literature all but ignores gender. To disregard gender ignores the most salient issues of who is doing the killing and who is doing the dying.

179. Bender wryly observed that "feminism is a dirty word. I never fail to be amazed at the strength of the hostility the word generates. . . . Professor Lucinda Finley likens it to the 'F' word." Bender, *supra* note 155, at 3 n.2.

180. The hesitation arises not because feminist scholarship lacks credibility, but rather because I am a male and because feminist learning is so grounded in the experiences of women. When male writers appropriate the writings of women, readers should be on their guard. For a particularly offensive appropriation wearing the mask of sensitivity, see Fraser, *What's Love Got to Do with It? Critical Legal Studies, Feminist Discourse and the Ethic of Solidarity*, 11 HARV. WOMENS's L. J. 53 (1988).

inquiry into serial sexual murder. To ignore or minimize gender, as virtually all traditional scholarship in this area does, disregards the critical point of who is killing whom. Second, feminism employs the mirror as a metaphorical device. So does this article, as shall be developed below. For example, Virginia Woolf in *A Room of One's Own*[181] powerfully described how women serve as mirrors reflecting back to men a magnified view of masculinity rather than acting for themselves, existing in their own right and defining themselves on their own terms. This is one manifestation of the culture's definition of woman as other, the inessential and abnormal to the male.[182] The idea of woman as other originated with Simone de Beauvoir, who argued in *The Second Sex*[183] that in patriarchal culture the masculine

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181. V. Woolf, *A Room of One's Own* 35 (1929) ("Women have served all these centuries as looking-glasses possessing the magic and delicious power of reflecting the figure of man at twice its natural size"). Woolf's metaphor has roots in M. Wollstonecraft, *Thoughts on the Education of Daughters* (1787) and M. Wollstonecraft, *A Vindication of the Rights of Women* (1789). Of course not *only* feminists use the mirror as metaphor. *E.g.*, Gasche, *The Tain of the Mirror: Derrida and the Philosophy of Reflection* (1986).

182. The concept of other is prominent in feminist discourse. *E.g.*, S. de Beauvoir, *The Second Sex* (1953); N. Chodorow, *The Reproduction of Mothering* (1978); A. Dworkin, *Pornography: Men Possessing Women* (1981); S. Griffin, *Pornography and Silence* 156-99 (1981). Patriarchal culture defines woman as other, as an object given content only by virtue of the *absence* of good (read male) qualities. Male subjectivity permits negation of the humanity of woman, of other.

Polarity is at the heart of gender definition and of the self/other dichotomy. Each gender is constructed as the opposite of the other. The contrast is the point -- opposition, ~~contrast,~~ negative definition, is the source of the definition of the other. The concept of otherness underlies categories of contrasting characteristics labeled masculine or feminine.

183. S. de Beauvoir, *supra* note 159.

is set up as the positive norm and the female or feminine is defined negatively, in terms definitionally non-masculine -- in terms of otherness. Third, feminist scholarship is useful because it tends to be interdisciplinary and inclusive rather than insular.[184]

Feminist learning typically employs gender as a fundamental organizing category[185] of human experience, holding that men and women have different

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184. Cameron and Frazer wrote: "One further sign of our commitment to feminism is the consciously interdisciplinary focus of *The Lust to Kill* and the fact that we have felt able to venture into academic territory where we have no special expertise. Feminists are notorious for not respecting the 'proper' boundaries of academic disciplines, and in our opinion that is all to the good." D. Cameron & E. Frazer, *supra* note 14, at xv.

185. Some poststructuralists, reacting to feminism's traditional focus on the experiences of white, middle class women, question the preeminence of gender. They posit that there is no essential "womanness," no woman but many women. For excellent treatments of the debate, *see* D. Fuss, *Feminism and the Power of Law* 114-137 (1989); E. Spellman, *Inessential Women: Problems of Exclusion in Feminist Thought* (1988); Harris, *Race and Essentialism in Feminist Thought*, 42 STAN. L. REV. 581 (1990); for an accessible discussion of how poststructuralist thought might influence feminist jurisprudence, see Ashe, *Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence*, 38 SYRACUSE L. REV. 1129 (1987).

These writers do not appear to reject gender as a frame of reference. Rather they claim that gender cannot be understood in isolation; experiences of gender cannot be separated from experiences based on race, class, sexual preference, cultural identity, etc. *E.g.*, Combahee River Collective, *A Black Feminist Statement*, in *All the Women Are White, All the Blacks are Men, But Some of Us are Brave* (G. Hull ed. 1982). These poststructuralists have as their goal the crafting of "a synthesis of class, race and gender perspectives into a holistic and inclusive feminist theory and practice." Zinn, Cannon, Higginbotham, & Dill, *The Cost of Exclusionary Practices in Women's Studies*, in *Making Face, Making Soul, Haciendo Caras: Creative and Critical Perspectives by Women of Color* 35 (1990). Their challenge goes to the heart of the matter of gender. Thornhill, for example, demands that "white feminists must re-edit our work in a way that the experiences of women of color are not

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perceptions or experiences in the same contexts, the male perspective having been dominant if not exclusive in fields of knowledge; and that gender is not a natural biological fact but a *social* construct, a learned quality, an assigned status -- and that it is therefore subject to identification by humanistic disciplines. Feminist theory often "begins by describing, defining, and exposing patriarchy. 'Patriarchy' is the feminist term for the ubiquitous phenomenon of male domination and hierarchy."[186] The word is a wide conceptual umbrella that covers systems of male dominance which oppress women through social, political, and economic institutions.

In the criminal law area, feminists have demonstrated convincingly that "what perhaps is the most paradigmatic expression" of patriarchical domination -- rape -- "is not, as the common mythology insists, a crime of desire, passion, frustrated attraction, victim provocation, or uncontrollable biological urges."[187] Feminist theory

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185. (...continued)
'merely tacked on as window dressing, diminished in parentheses, or hidden in footnotes.'" Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L. J. 115, 117 (1989) (quoting Thornhill, *Focus on Black Women*, 2 CAN. J. WOMEN & L. 153, 190 (1985)). For other critiques by women of color of white feminist theory and practice, *see, e.g.*, *Common Differences* (G. Joseph & J. Lewis eds. 1981); *Home Girls: A Black Feminist Anthology* (B. Smith ed. 1983); b. hooks, *Ain't I a Woman: Black Women and Feminism* (1981); b. hooks, *Feminist Theory: From Margin to Center* (1984).

186. Bender, *supra* note 155, at 5-6.

187. J. Caputi, *supra* note 14, at 3. Feminist scholarship has explored the topic of rape in some detail. *E.g.*, S. Brownmiller, *Against Our Will* (1976); L. Clark & D. Lewis, Rape: The Price of Coercive Sexuality (1977); S. Estrich, *Real Rape* (1986); S. Griffin, *Rape: The Power of Consciousness* (1979); N. Gager & K. Schurr, *Sexual Assault: Confronting Rape in America* (1976); C. MacKinnon, *Toward a Feminist Theory of the State* 171-84 (1989); A Medea & K. Thompson, *Against Rape*
(continued...)

defines rape as a violent act, but also as a social institution which perpetuates patriarchal domination. It is thus not "perpetrated by an aberrant fringe. Rather, rape is a social expression of sexual politics, an institutionalized and ritual enactment of male domination, a form of terror which functions to maintain the status quo."[188] Caputi further and more problematically reasoned that like rape, "sexual murder is not some inexplicable explosion/epidemic of an extrinsic evil or the domain of the mysterious psychopath. On the contrary, such murder is an imminently logical step

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187. (...continued)
(1974); K. Millett, *Sexual Politics* 44, 184, 335 (1970); D. Russell, *Rape in Marriage* (1982); D. Russell, *The Politics of Rape* (1975); C. Smart, *Feminism and the Power of Law* 26-49 (1989); Estrich, *Rape*, 95 YALE L. J. 1087 (1986).

Brownmiller, in *Against Our Will*, *supra*, asserted that sexual violence against women is not only culturally condoned and widespread, but that rape is an important means by which some men establish their "manhood." Because of the *possibility* of rape as well as its pervasive actuality, Brownmiller described rape as "nothing more or less than a conscious process of intimidation by which *all men* keep *all women* in a state of fear." S. Brownmiller, *supra* at 15 (emphasis in original). She included *all* men because any man could be a rapist, and because even men who do not rape are the beneficiaries of the climate of coercion created by men who do. She defined rape as an *institution,* because the weight of patriarchal culture conspires with the rapist. Rape *and the threat of rape* serve as the main agents of the "perpetuation of male domination over women by force." *Id.* at 17. She thus viewed rape as an insidious form of social control, because rape is a constant reminder to all woman of their vulnerable condition.

Dworkin, in A. Dworkin *Woman Hating* (1974) and A. Dworkin, *Pornography* (1981), argued that the driving engine of male history is male violence. In A. Dworkin *Intercourse* (1987) she asserted that pornography (see *infra* note ___) is at the bottom of male supremacy.

188. J. Caputi, *supra* note 14, at 3.

in the procession of patriarchal roles, values, needs and rule of force."[189] One need

189. J. Caputi, *supra* note 14, at 3. Some feminist writers, including Caputi, see a connection between pornography and violence against women including rape. They argue that the pervasive pornographic dimension of United States' culture creates enduring images that glorify (or at least condone) sexual violence against women -- up to a point. *E.g.*, C. Smart, *Feminism and the Power of Law* 114-137 (1989); Z. Eisenstein, *The Female Body and the Law* 162-74 (1988); C. MacKinnon, *supra* note 164, at 195-215; C. MacKinnon, *Feminism Unmodified* (1988); L. Lovelace & M. McGrady, *Ordeal* (1980); K. Barry, *Female Sexual Slavery* 174-214 (1979); A Dworkin, *Pornography: Men Possessing Women* (1981); S. Griffin, *Pornography and Silence* (1981); *Take Back the Night: Women on Pornography* (L. Lederer ed. 1981).

The pornography debate is complicated, divisive, and easy to oversimplify. MacKinnon, Griffin and Dworkin do not argue that there are direct, objective, empirically demonstrable causal relationships between pornography and rape. Feminists, particularly critics in science, contend that concepts such as "objectivity," "empiricism," and "neutrality" are themselves suspect. *E.g.*, N. Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (1978); D. Dinnerstein, *The Mermaid and the Minotaur: Sexual Arrangements and the Human Malaise* (1976); M. Eichler, *The Double Standard: A Feminist Critique of Feminist Social Science* (1980); Z. Eisenstein, *The Female Body and the Law* 42-51 (1988); S. Harding, *The Science Question in Feminism* (1986); E. Keller, *Reflections on Gender and Science* 67-115 (1985); *The Prism of Sex: Essays in the Sociology of Knowledge* (J. Sherman & E. Torton eds. 1977); *Feminist Praxis: Research, Theory, and Epistomology in Feminist Sociology* (L. Stanley ed. 1990); Keller, *Feminism and Science*, in *Feminist Theory* (N. Keohane ed. 1982); Keller, *Gender and Science*, in I PSYCHOANALYSIS AND CONTEMPORARY THOUGHT 409 (1978); *see also* C. MacKinnon, *supra* note 164, at 120-24, 162-63, 183; C. MacKinnon, *supra* at 54-55; Cain, *Realism, Feminism, Methodology and Law*, 14 INTERNATIONAL J. FOR THE STUDY OF LAW 255 (1986); Mies, *Towards a Methodology for Feminist Research*, in THEORIES OF WOMEN'S STUDIES (G. Bowles ed. 1983); Minnow, *Supreme Court Forward: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Reinharz, *Experimental Analysis: A Contribution to Feminist Research*, in THEORIES OF WOMEN'S STUDIES (G. Bowles ed. 1983); Scales, *The Emergence of a Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); *Doing Feminist Research* (H. Roberts ed. 1981); Stanley & Wise, *Back Into the Personal, or Our Attempt to Construct 'Feminist Research,'* in THEORIES OF WOMEN'S STUDIES (G. Bowles ed. 1983). According to Mies, for example, identification with the research subject is essential to feminist research. Such conscious partiality is opposed to "objective" spectator knowledge, which takes a "neutral," independent attitude toward the research subject.

(continued...)

not subscribe to Caputi's entire worldview[190] to appreciate her insight that sexual murderers, like rapists, are not so different from the rest of us as we might like to believe.[191]

Bundy's typicality as an all-American guy was hammered home to me early in his postconviction litigation. A man who had observed Bundy closely saw parallels between Bundy and the masculine characters created by Norman Mailer[192] (who transparently identified with his literary creations). The comparison between Bundy

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189. (...continued)

As to pornography itself, MacKinnon, Griffin and Dworkin contend that the images created by pornography shape desires by making available certain objects and meanings, given that desire itself is to some degree a cultural construct. *E.g.*, Coward, *Introduction*, in *Desire: The Politics of Sexuality* (A. Snitow ed. 1984). Even terms like "censorship" are not clear cut. MacKinnon, Griffin and Dworkin see pornography itself as a form of censorship, since it silences the authentic voices of women.

Other feminists find the anti-pornography approach of Dworkin, Griffin and MacKinnon distracting and diffusing. Dunlap claimed that the important issue is the reality of rape, not the image of rape contained in pornography. "If we take on pornography as the image of rape, and we destroy it, we will have destroyed, I suspect, nothing more than the image of rape. . . . Let us end rape." Du Bois, Dunlap, Gilligan, MacKinnon, & Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law -- A Conversation*, 34 Buffalo L. Rev. 11, 81 (1985).

190. I prefer to be agnostic at the moment.

191. A recent Newsweek magazine cover story on rape concluded that sexual violence "may now be an emblem of the American way." Gelman, *The Mind of the Rapist*, Newsweek, July 23, 1990 at 52. "After two decades of the newly 'sensitive,' nurturing male, the macho stud seems to have come back in magnum force." *Id.*

192. For an illuminating treatment of Mailer's position in the literary culture of the United States, see K. Millett, *supra* note 164, at 9-16, 314-35. Millett also has interesting discussions of D.H. Lawrence, Henry Miller, and Jean Genet. *Id.* at 237-313, 336-361.

and Mailer shocked me at first, but as I reflected I gradually began to appreciate its haunting logic. I had forgotten (blocked?) the comparison until I recently read Cameron's and Frazer's excellent feminist study of sexual murderers.[193] Cameron and Frazer analyzed Mailer's 1957 essay *The White Negro*[194] as a highly articulated expression of the psychopathic killer as ultimate individualist,[195] existential rebel and cultural hero -- a social outlaw who celebrates murder as a liberating event and who sees the murderer as catalyst of social change.[196] He begins to resemble a latter-day incarnation of Nietzsche's *Ubermensch,*[197] Dostoyevsky's Raskolnikov:[198] a Faust

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193. D. Cameron and E. Frazer, *supra* note 14.

194. Mailer, *The White Negro*, in N. Mailer, ADVERTISEMENTS FOR MYSELF 302 (1959).

195. In literature, "the male metaphor, and the male travail, is individualist." Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 586 (1986). *See also* M. Ellman, *Thinking About Women* (1968); J. Fetterley, *The Resisting Reader: A Feminist Approach to American Fiction* (1978); S. Gilbert & S. Guber, *The Madwoman in the Attic: The Woman Writer and the Nineteenth Century Literary Imagination* 67 (1979); Baym, *Melodramas of Reset Manhood: How Theories of American Fiction Exclude Women Authors*, in *The New Feminist Criticism: Essays on Women, Literature, and Theory* 63, 71 (E. Showalter ed. 1985).

196. D. Cameron & E. Frazer, *supra* note 14, at 32; J. Caputi, *supra* note 14, at 110; S. Griffin, *supra* note 166, at 90-91, 94 (discussing N. Mailer, *The American Dream* (1965)); K. Millett, *supra* note 164, at 9-16 (same). On Mailer generally, see K. Millett, *supra* note 164, at 314-35; Greer, *My Mailer Problem*, in G. Greer, *The Madwoman's Underclothes* 78 (1986).

197. F. Nietzsche, *Beyond Good and Evil* (R. Hollingdale tr. 1981); F. Nietzsche, *Ecce Homo* (R. Hollingdale tr. 1979).

Attempts to emulate Nietzsche's superman apparently played a rôle in the notorious Leopold and Loeb "thrill killing" case in the 1920's. Clarence Darrow

(continued...)

or Superman who transcends conventional morality in the cause of his own liberation.[199]

Misogyny, grounded in the dominant culture, combined with the Mailer paradigm of masculinity, also grounded in prevailing culture, meld to make possible the serial sexual murderer in the United States. Cameron and Frazer observed that such a murderer is a peculiarly North American invention. Other societies have had their mass murders and have developed a discourse within which to define them. But "the real reason why the concept of serial murder has arisen in North America and not elsewhere is its dependence on a certain representation of North America itself, its culture, its symbols, its heroes. The serial killer . . . is the American counterpart of [Jean] Genet's[200] or [Colin] Wilson's existential rebel."[201] Indeed, "the

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197. (...continued)
argued that Leopold had been strongly influenced by reading Nietzsche's philosophy, taught to him at the University of Chicago. *See* C. Darrow, *The Story of My Life* (1936); C. Darrow, *Attorney for the Damned* 70 (A. Weinberg ed. 1957); H. Higdon, *The Crime of the Century* 341 (1975); I. Stone, *Clarence Darrow for the Defense* 247, 250 (1965); K. Tierney, *Darrow: A Biography* 341 (1979).

198. F. Dostoyevsky, *Crime and Punishment* (D. Magar-Shack tr. 1951).

199. D. Cameron & E. Frazer, *supra* note 14, at 160-61.

200. For a thoughtful discussion of Genet in this regard, see K. Millett, *supra* note 164, at 336-61.

201. D. Cameron & E. Frazer, *supra* note 14, at 158. Cameron and Frazer discussed in fascinating detail existentialism and the theme of murder as the ultimate act of transcendence (and will and freedom and defiance) of the material constraints which normally determine human destiny. *Id.* at 58-66. They traced the theme of sexual murderer as rebel/hero from the writings of the Marquis de Sadé, whom they denote as the father of the sexual murderer: "The aspect of Sade's life and work
(continued...)

sort of figure who is celebrated in Mailer's essay -- hip, cool, psychopathic -- has in fact become a touchstone of American masculinity. He is an up-to-date exemplar of the 'outlaw' tradition which appears in a variety of representations in North America."[202] The serial killer therefore becomes a "transformation of the traditional loner on his unending journey, a persuasive incarnation of the 'Man with no Name.' Traditional North American individualism sorts well with the existentialist theme of the free man's right to transcend ordinary constraints on behavior."[203] Cameron and Frazer concluded that this quest for transcendence through murder, combined with misogyny reinforced and validated by societal norms, best accounts for serial sexual murders.[204]

Cameron and Frazer were describing the murderer-as-rebel/hero generally. Caputi and others made the point as to Bundy particularly. While Bundy was

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201. (...continued)
which has converted western imagination is the idea that the individual who transgresses [man-made laws] is a rebel in search of freedom and pleasure -- a 'transcendence' -- which society, in its ignorance and repressiveness, denies him. Thus, the way is paved for the sexual murderer to become the quintessential modern hero." *Id.* at 58. Cameron's and Frazer's treatment of Sade's modern interpreters among the existentialists -- Sartre, de Beauvoir, Genet, Gide, Wilson -- as well as their thoughtful critique of the existentialists' account of (and celebration of) the murderer, were particularly interesting. *Id.* at 58-66.

202. *Id.* at 161. A male novelist recently asserted that "America's greatest contribution to pop literature is the tough-guy hero, that hard-punching, hard-drinking, hard loving macho *mensch* who can't help annoying the bad guys, even while he makes every woman swoon." Kent, *The Governor Did It*, N.Y. Times Book Rev., Aug. 19, 1990, at 22 (reviewing S. Pett, *Sirens* (1990)).

203. D. Cameron & E. Frazer, *supra* note 14, at 161.

204. *Id.* at 166-70.

awaiting trial in Aspen, Colorado for the kidnapping and murder of Caryn Campbell, he twice escaped[205] and eventually made his way to Florida. Prior to the escapes, Bundy had been convicted of kidnapping and publicly connected with many sexual murders in the Pacific Northwest.[206] Yet when he escaped, particularly for the second time, much of the Aspen public rooted for him. Caputi accurately noted that "all observers concur: 'In Aspen Bundy had become a folk hero.' 'Ted achieved the status of Billy the Kid, at least;' or 'Aspen reacted as if Bundy were some sort of Robin Hood instead of a suspected mass murderer'."[207] T-shirts proclaimed "Bundy is a one night stand;" a radio station adopted a Bundy request hour, playing songs such as "Ain't no way to treat a lady;" an Aspen restaurant advertised a Bundyburger, a plain roll because, explained the sign, "the meat has fled."[208] He was even memorialized in doggerel:

> So let's salute the mighty Bundy
> Here on Friday, gone on Monday
> All his roads lead out of town
> It's hard to keep a good man down[209]

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205. R. Larsen, *supra* note 4, at 206-221, 242-43; S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 178-200; A. Rule, *supra* note 5, at 334-56.

206. R. Larsen, *supra* note 4, at 94 (describing media coverage); S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 153 (same).

207. J. Caputi, *supra* note 14, at 51.

208. *Id. See also* R. Larsen, *supra* note 4, at 210-11, 221; S. Michaud & H. Aynesworth, *Witness*, *supra* note 5, at 187; A. Rule, *supra* note 5 at 238, 255-56.

209. A. Rule, *supra* note 5, at 255; *see also id*. at 255-56; J. Caputi, *supra* note 14, at 46, 47, 50. Cameron and Frazer noted a similar reaction in England to the (continued...)

It is especially interesting that this outburst of enthusiasm occurred following Bundy's *escape* from custody.[210]

Viewed through the lens of gender provided by writers such as Caputi, Cameron and Frazer, one sees that Bundy remained part of the culture precisely *because of* -- not in spite of -- his crimes. The very acts we *want* to think set him apart in fact reinforced his definition as one of us. He thus remains a symbol of evil, although not of evil alone. He represents something far more frightening. He can best be treated as a multiprisomed symbol or a mixed metaphor: a demon, but a demon that also is an all too recognizable societal construct of masculinity, albeit a construct perhaps containing aspects bordering on caricature. Perhaps.

Yet precisely because Bundy was recognizably part of the dominant culture, one might have expected him to have been exempt from capital punishment. The psychological distancing -- and hence the dehumanizing essential to the

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209. (...continued)
Yorkshire Ripper. "Many women reported casual comments from men that implied they shared the Ripper's pleasure in female fear. In Leeds, football crowds adopted 'Jack' as a folk hero and chanted at one stage 'Ripper eleven, police nil'." D. Cameron & E. Frazer, *supra* note 14, at 33.

210. "After his first escape, the male identification was with Bundy as outlaw rebel-hero. But subsequently, Bundy did the supremely unmanly thing of getting caught." Caputi *supra* note 128, at 447. Similarly, a partial explanation for Jack the Ripper's unparalleled ability to generate mythology, J. Caputi, *supra* note 14; T. Cullen, *When London Walked in Terror* 285 (1968), can be attributed to the fact that he was never caught.

determination that a fellow human deserved to die -- was less apparent here than in most capital cases. Still, *he* became *the* symbol of death row.

The easy and comfortable explanation is that Bundy committed horrible crimes against helpless white[211] women. That answer rings false, however. Conviction of awful crimes is perhaps a necessary, but certainly is not a sufficient, condition for designation as a symbol of whom we want to execute--for the creation of a symbol as enduring as Theodore Bundy.

Consider as a cautionary tale the comparison of Gerald Stano,[212] another accused serial killer on Florida's death row. Like Bundy, Stano is a man alleged to have murdered many women during the 1970's. Have you ever heard of Gerald Stano? If not, then you are in good company. Most people have never heard of Stano, not even most Floridians.[213] Stano's cases have resulted in no books, no

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211. *See supra* note 144-52 and accompanying text.

212. *See generally* Stano v. State, 520 So. 2d 278 (Fla. 1988); Stano v. State, 497 So. 2d 1185 (Fla. 1986); Stano v. State, 473 So. 2d 1282 (Fla. 1985); Stano v. State, 460 So. 2d 890 (Fla. 1985); *see also* Stano v. Dugger, 901 F.2d 898 (11th Cir. 1990) (*en banc*) (remanding for evidentiary hearing). I emphasize that Stano maintains his innocence, a fact underscored by a panel of the Eleventh Circuit's recent decision mandating a new trial in one series of Stano's cases. *See* Stano v. Dugger, 889 F.2d 962 (11th Cir. 1989) (remanding for issuance of habeas corpus writ commanding retrial), *vacated pending rehearing en banc*, 897 F.2d 1067 (11th Cir. 1990).

213. Interestingly Bundy and Stano were at one point scheduled to be executed on the same day in 1986. A. Rule, *supra* note 5, at 450; *see also supra* notes 57-64 and accompanying text (discussing Bundy's successful efforts to avoid this execution date). Former Florida Governor (now United States Senator) Robert Graham often signed death warrants in pairs, occasionally adopting warrant "themes." The Bundy/Stano theme apparently was serial killers. On another
(continued...)

movies, comparatively little media attention. Even scholarly studies of serial murder tend to dwell on Bundy and to ignore Stano.[214] This is curious, given the similarities between Stano's and Bundy's alleged crimes. Stano would respond that he differs from Bundy because he is innocent. But, as was suggested above, the evidence of Bundy's guilt presented at trial was also far from overwhelming.[215]

The difference is that Stano lacks the qualities of stardom. Stano is overweight, where Bundy was trim and attractive. Stano is balding, where Bundy was rakish and photogenic. Stano is undereducated, inarticulate, quite possibly

Stano

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213. (...continued)
occasion, Graham signed simultaneous warrants on two inmates with the last name Thomas.

The contrast between the media coverage of the impending Bundy and Stano executions was telling. Every event and nonevent in Bundy's litigation received microscopic coverage. The Stano litigation, when mentioned at all, was usually discussed as a comparison to the Bundy case.

214. For example the index to the Caputi book listed a single reference to Stano and 25 to Bundy, and one of the book's introductory epigrams contained a reference to Bundy. *See* J. Caputi, *supra* note 14, at 1. The Cameron and Frazer work had no references to Stano but only one to Bundy. *See* D. Cameron & E. Frazer, *supra* note 14. This may reflect the latter writers' orientation toward cases arising in the United Kingdom.

215. *See supra* notes 47-50 and accompanying text.

crazy, where Bundy the former law student[216] was eloquent and artful in his use of the mask of sanity.[217] Stano is one of "them." Bundy was one of "us."

The Stano comparison underscores that Bundy's notoriety did not result from public revulsion against what he did to women -- that Bundy did not become death row's symbol because of his peculiar contempt for women. It is true that Bundy's victims were comparatively valued by society (college students rather than prostitutes,[218] white women rather than women of color),[219] while Stano's alleged

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216. Rule wrote that Bundy's "I.Q. alone nearly equalled Stano's and [another condemned inmate's] combined." A. Rule, *supra* note 5, at 434. This is hyperbole, but it tellingly captures the public perception that Bundy was brilliant while Stano, to say the least, is not.

217. This evocative term originated in H. Cleckley, *The Mask of Sanity: An Attempt to Clarify Some Issues About the So-Called Psychopathic Personality* (5th ed. 1976). Cleckley, a psychiatrist, examined Bundy and testified at his pretrial hearing that Bundy was competent to stand trial but that he exhibited antisocial behaviors. R. Larsen, *supra* note 4, at 345-46; A. Rule, *supra* note 5, at 345.

Caputi insightfully switched Cleckley's terms and referred to the psychopath's mask of *insanity*, deftly making her point that Cleckley's designation obscures the real similarities between sexual killers and "normal" men. J. Caputi, *supra* note 14, at 109.

One of my colleagues insists that Bundy can only be explained by mental illness: Bundy *must* have been crazy to have done those things. To the extent that this view is widespread, it says more about our fears (or our hopes) than it says about Bundy's mental condition.

218. Cameron and Frazer surveyed the criminology literature and concluded that the "callous treatment of prostitute murder victims, which excuses -- or rather, *erases* -- male sadism, recurred in practically every source we looked at." D. Cameron & E. Frazer, *supra* note 14, at 31; *see also* J. Caputi, *supra* note 14, at 46-47.

219. *See supra* notes 144-52.

victims were women marginalized by society (prostitutes, run-aways). Still, the identities of Bundy's victims provide little meaningful insight into the culture's reaction to Bundy.

Again feminist learning illuminates, and again the image emerges of Bundy as a Norman Mailer character carried a bit too far -- a difference of degree rather than kind. Few men would do what Bundy did, but many men share at least some of Bundy's desires. Or as one writer who contributes often to horror magazines phrased it (satirically?): "Most men just hate women. Ted Bundy killed them."[220]

It should go without saying that I am not excusing *Bundy's* crimes by putting them in cultural context. To the contrary, this article's reasoning condemns the *culture* for being more like its image of Bundy than it wants to realize.

The reasons Bundy came to symbolize death row -- as well as identifying precisely what he *does* symbolize -- thus are matters both complex and paradoxical. This article does not attempt to resolve such questions in any satisfactory way. It need not do so for the purposes here. The fact remains that regardless of the explanations Bundy *does* personify death row. And that personification helps explain both the legal system's actual treatment of his cases as well as popular misconceptions about that treatment.

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220. McDonough, *I Can Teach You How to Read the Book of Life*, 3 Bill Landis' Sleazoid Express, No. 7, at 3-5 (1984) (quoted in J. Caputi, *supra* note 14, at 1). Caputi described McDonough *id.* at 61-62.

IV. Conclusion: Bundy as Other, Bundy as Us

> Over and over, the chauvinist draws a portrait of the other which reminds us of that part of his own mind he would deny and which he has made dark to himself . . . . The chauvinist cannot face the truth that the other he despises is himself. This is why one so often finds in chauvinist thinking a kind of hysterical denial that the other could possibly be like the self.[221]

Despite the hype about "10 years of repetitive judicial review," the legal system failed in Bundy's case. At the time of his execution, dozens of people on Florida's death row had been there longer than Bundy; it cost the Florida taxpayers millions of dollars to execute him.[222] We had failed as attorneys by failing to identify the critical constitutional issue sooner. The courts failed as well. Judging metaphors is as hard as being their advocates. The fact that Bundy had become a myth made it difficult for judges to judge.[223]

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221. S. Griffin, *supra* note 166, at 161, 162.

222. The media quoted an unidentified prosecutor's estimation that killing Bundy cost the State of Florida approximately $6 million. *See* Stott, *No way to tell if Bundy's a true $6 million man*, FLORIDA TIMES UNION (Jacksonville), Jan. 13, 1988, at B1; Crawford, *Trying to kill Bundy costs millions more than life in prison*, ORLANDO SENTINEL, Dec. 18, 1987, at A14. The state attorney general's office declined an academic's request to estimate officially the cost of killing Bundy. *See* Letter from Walter Meginniss, Director, Criminal Appeals, Office of the Florida Attorney General, to Dr. Michael Radelet, Associate Professor, University of Florida (Dec. 30, 1987), at 1 ("You are advised that a study of the costs in the Bundy case has not been conducted in this office and consequently, your request for a copy must be declined") (copy on file with author).

223. The public outrage over judicial invalidation of capital sentences can be intense, as is evidenced by the successful recall of California Supreme Court Chief Justice Rose Bird and her two colleagues based principally on their votes in death cases. *See* Tabak, *The Death of Fairness*, 14 N.Y.U. REV. L. & SOCIAL CHANGE 797,

(continued...)

Because Bundy was so *atypical* of the death row population (attractive, comparatively smart, white, recognizably middle class), how is it that he came to be the emblem of death row--the symbol for capital punishment itself? The paradoxical explanation, suggested in section III, is that he came to represent death row precisely because he was so atypical of the condemned--and so typical of, and therefore recognizable by, the dominant culture in the United States. He was "one of us."[224]

It may well be that Bundy was *executed* because his crimes set him apart -- although, as the discussion in section III suggests, Bundy's offenses may simply fall along the continuum of masculine violence at a point that society cannot explicitly tolerate. Regardless, he became death row's *symbol* not because he was different but rather because he was similar.[225] The manic festival celebrating Bundy's execution reflected what Griffin termed "the hysterical denial that the other could possibly be like the self."[226] By "inventing a figure different from self," here our

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223. (...continued)
847 (1986); *see also*, *e.g.*, Robson & Mello, *Ariadne's Provisions*, 76 CAL. L. REV. 87, 92 n. 17 (1988) (describing the public reaction to an Eleventh Circuit decision invalidating a Georgia conviction and death sentence).

224. Remember that "one of us", "we", or "our" refers to the dominant culture, *i.e.*, male, white, comparatively affluent.

225. *Cf.* S. Griffin, *supra* note 166, at 174.

226. *Id.* at 162.

Similarly, and ironically given Bundy's apparent preoccupation with pornography (*see* Bullough & Kuntz, *On Ted Bundy, Pornography, and Capital*
(continued...)

image of death row, we construct "an allegory of self" that contains the values the culture defines as positive.[227] This construction, however, depends on difference and distance. The other can never be permitted to begin to resemble the self. The line between self and other must remain distinct. Bundy hit an exposed cultural nerve -- and the culture needed not merely to kill him but to dance on his grave -- because Bundy blurred the line between self and other, between us and them.

Because he was so recognizably "one of us," Bundy was a mirror for each of us. He unflinchingly and remorselessly reflected our deepest fears. We have seen the enemy, to borrow from *Pogo*, and he is us. We hated seeing the things he made us see in ourselves. So we shattered the mirror and destroyed the image it contained. We still look the same. *Our* ignorance and fear and hatred remain

Yet the tain of the mirror remains

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226. (...continued)
Punishment, 9 Free Inquiry, No. 9, at 54 (Spring 1989); A. Rule, *supra* note 5, at 494-95; S. Michaud & H. Aynesworth, *supra* note 5, at 65, 105, 107, 117), a functionally similar process of cultural negation permitted *him* to become defined as other, negated, killed. Writing of women but equally true of Bundy and other condemned people, Cameron and Frazer observed that "what turning persons into objects is all about, in our culture, is, in the final analysis, killing them." D. Cameron & E. Frazer, *supra* note 14, at 176.

Martin Luther King wrote along these same lines in *Letter From a Birmingham Jail* when he described segregation as wrong in part because it "ended up relegating persons to the status of things . . . To use the words of Martin Buber, segregation substitutes an 'I-it' relationship for the 'I-thou' relationship. . . . " M. King, *A Testament of Hope: The Essential Writings of Martin Luther King* 294 (1986). For an interesting discussion of Buber's I-Thou idea as it might apply to law, see Ciampi, *The I and Thou: A New Dialogue For the Law*, 58 U. Cinn. L. Rev. 881 (1990).

227. S. Griffin, *supra* note 166, at 162.

unchanged. But with Theodore Bundy dead, we are no longer forced to see ourselves.

Or are we?

G. Sun
June 30, 1986

Bundy's appeal will be heard today

The Associated Press

MIAMI — Attorneys for Theodore R. Bundy, who is scheduled to die in two days in Florida's electric chair, said Sunday they will appeal his murder conviction for the slayings of two coeds on Bundy's competence to stand trial and the effectiveness of the dozen or so lawyers who have represented him since his 1978 arrest.

The motion to overturn Bundy's conviction and sentence was delivered to the court Saturday at 9 p.m. EDT, said James Coleman, a Washington, D.C., attorney who took up Bundy's case with his associate, Polly Nelson, in February.

The hearing on Bundy's appeal is scheduled for 8 a.m. today before Dade Circuit Judge Edward Cowart, who presided over Bundy's trial in 1979 and sentenced the former law student to death.

"We are raising issues that have not been decided by the state court," said Coleman, who is challenging the adequacy of Bundy's competency hearing in 1979 before he stood trial for the brutal Jan. 15, 1978 slayings of two Florida State University sorority sisters in Tallahassee.

Also at issue is the effectiveness of at least 14 lawyers who have represented Bundy through a court record that is now more than 10,000 pages, Coleman said.

Bundy, 39, is on his second death warrant, signed by Gov. Bob Graham on May 22. His March 4 execution date passed when the U.S. Supreme Court granted him a stay and then rejected his appeal May 5.

Linked by authorities to the slayings of young women in Washington, Utah and Colorado beginning in 1974, Bundy was at one time on the FBI's 10 Most Wanted list for questioning in 36 slayings.

Bundy also was condemned to death for the abduction and slaying of 12-year-old Kimberly Diane Leach in Lake City on Feb. 9, 1978.

Tom Leach, father of Diane, Bundy's youngest known victim, said he was ready to celebrate if the scheduled execution comes off.

See BUNDY on page 2C

Bundy

From page 1C

"I just want to see him well-done. Don't we all?" Leach, of Lake City, said in a story published Sunday in the Fort Lauderdale News and Sun-Sentinel.

Leach, a tow-truck service operator, said he'll celebrate by "getting drunk, I imagine, and I don't even drink."

He said he had asked to witness the execution but wasn't allowed by the state.

"I wish they'd bring him back to Lake City and let us all have at him," Leach said. What would he do to Bundy?

"I got a pretty good idea, but I don't want to say." He added that the years haven't eased the pain of the loss of their young daughter, noting that she would have been a young woman now.

"I see them (her classmates) all the time," Leach said.

"When you look at one of them, you know how big she'd be right now, how she'd look."

The Fort Lauderdale newspaper said the parents of Bundy's Chi Omega victims declined to be interviewed.

"If and when Ted Bundy is executed, we may make a statement at that time," said Jackson Bowman, Margaret's father. "I find it very difficult to talk about. It's still a very painful subject."

Sixteen men have been executed in Florida since the death penalty was reinstated in 1979.

Bundy's attorneys fail in 2 appeals

STARKE, Fla. (AP) — The highest courts of the state and the nation refused Monday night to block the Tuesday morning execution of Ted Bundy, who during the last three days confessed to 20 murders in Western states.

The 42-year-old law school dropout was described as subdued and emotional as he met with psychiatrist Dorothy Lewis, apparently as part of his lawyers' preparations for an argument that Bundy was mentally incompetent to be executed.

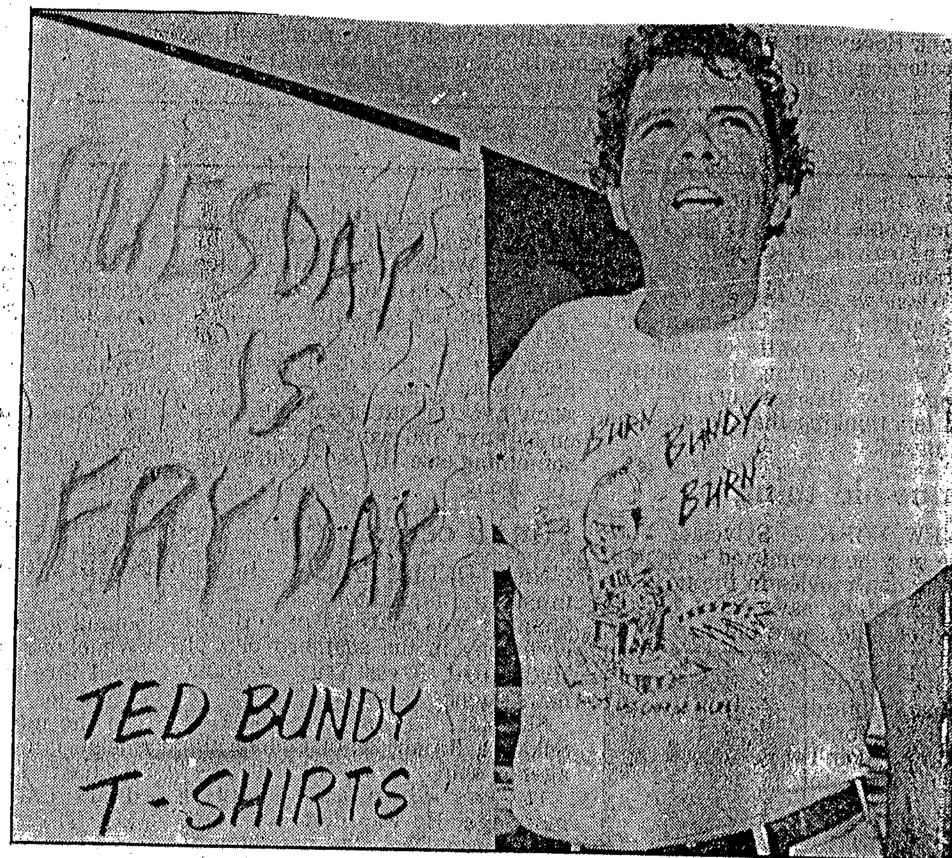
After confessing during the weekend to two Colorado murders, he talked with Colorado investigators again Monday, but disclosed no information about three unsolved slayings in the state, officials said.

Bundy also met with James Dobson, host of a California religious radio show, during the afternoon. But it was not clear whether Bundy would allow Dobson to discuss the interview before the execution.

Bundy was scheduled to die in Florida's electric chair at 7 a.m. Tuesday for the 1978 kidnap-murder of 12-year-old Kimberly Leach of Lake City. He also was convicted of killing two sorority sisters in Tallahassee in 1978.

U.S. Supreme Court justices voted 5-4 to reject an emergency request aimed at keeping Bundy alive until a formal appeal could be filed with the nation's highest court. The justices had four times previously rejected formal appeals from Bundy.

Bundy's lawyers argued that jurors in the Leach case were misled about the importance of their role in determining whether Bundy would receive the death penalty or life in prison for his crime.



Man sells T-shirts outside prison gate

AP

– DOTHAN EAGLE, DOTHAN, AL 1-24-1989 – Page One

Bundy's Points : Leach

1. Competence — hearing ordered, denied
2. Hypnosis — sufficient cross-x and testimony regarding hyp; denied
3. Pre-trial publicity — Not "inflammatory;" no "manifest error;" denied
4. Denial of clemency — A matter of ~~[illegible]~~ executive discretion, denied
5. Ineffective assistance — not proved to level required by <u>Strickland</u>, denied
6. Faretta analysis — defaulted, but also ~~[illegible]~~ harmless error
7. McClesky — no evidence of discrimination, denied
8. Exclusion of anti-DP jurors — Witherspoon applies, denied
9. Admission of libers — Court had no duty to challenge sua sponte, denied
10. Denial of visit to scene — Was not crucial evidence, denied
11. Admission of his flight ~~[illegible]~~ — Properly admitted & instructed, no error, denied
12. Utah case as 2 aggs. — Clearly different elements, denied
13. Denied choice of counsel — failed to raise on direct, defaulted
14. Faced dp bec. insisted on trial — No evidence of vindictiveness, denied

Thursday, October 7, 1982

State High Court Hears Bundy Appeal

TALLAHASSEE (AP) — Criticizing controversial bite-mark evidence, witness hypnosis and widespread publicity, a lawyer Wednesday attacked Theodore Bundy's conviction in the 1978 murders of two sorority sisters.

"My opinion is that the conviction in this case cannot stand. It cannot stand as it is . . .," defense lawyer Robert Harper Jr. told the Florida Supreme Court in oral arguments. He said the case would serve as a "landmark in legal history."

Bundy, a 35-year-old former law student from Tacoma, Wash., is appealing his conviction and death sentence in the murders of two Florida State University sorority sisters. Under Florida law, capital cases are automatically appealed to the high court.

Bundy is on Death Row for fatally bludgeoning Margaret Bowman, 21, and Lisa Levy, 20, as they slept in the Chi Omega house at FSU. He also was convicted of attacking three other women, two at the sorority house, the same night. They lived.

The six justices gave no indication when they would rule on the appeal. At some point in the future, they also will hear Bundy's appeal of another death sentence for the murder of a 12-year-old Lake City girl.

Harper opened his 30-minute attack on the state's case with questions about bite marks the state said Bundy left on one of the students.

Among the more sensational aspects of the trial was testimony by Dr. Richard Souviron, a forensic odontologist from Coral Gables who said Bundy's teeth matched marks left on one of the victims.

"The standards involved in bite-mark evidence are of such an embryonic nature there is no standard at all recognized by the medical community or the legal community," Harper said, adding that key state evidence was provided by "one doctor (Souviron) who is out to get famous on this case."

Harper also challenged the hypnosis of state witness Nita Neary, who identified Bundy as the man she saw carrying a club out of the Chi Omega house the night of the killings.

Although Harper didn't elaborate on the issue of widespread publicity, he identified it as one of three main problem areas in the case.

Assistant Attorney General David Gauldin argued that fairness of the trial was the bottom line.

"I think he got a fair trial and I think the jury was untainted," said Gauldin. He criticized Bundy's claim that he got inadequate legal help from an "army" of lawyers.

"He hired and fired lawyers at will, all of them publicly provided," Gauldin said.



ROBERT HARPER JR.
Bundy's Attorney for Appeal



DAVID GAULDIN
Assistant Attorney General



Theodore Bundy

Bundy's la

By GEORGE THURSTON
Special to the Democrat

Convicted killer Theodore Bundy sits in his cell on Death Row at the Florida State Prison at Starke while his appeals to the state Supreme Court creep at a petty pace from day to day.

His appeals on convictions of murdering three women are stalled while defense lawyers work on legal briefs.

Bundy sees few visitors except his wife Carole Boone, and her son, James (Jamie) Boone, who, prison officials say, visit Bundy at the prison almost every week.

The Boones are rarely accompanied by her young daughter, born last year in Gainesville.

Even his defense attorney, Victor Africano,

wyers slowly preparing appeals

3/15/82

says he hasn't seen Bundy "in a couple of months."

Bundy is held in a cell in Death Row after being convicted of killing two Chi Omega sorority women at Florida State University and a 12-year-old school girl in Lake City in early 1978.

He was sentenced to death for each of the three murders, in addition to 198 years in prison for other offenses.

Bundy's appeals to the Florida Supreme Court are at a standstill, although the court has received the voluminous trial records from both his murder trials.

Defense attorneys have not filed their briefs to the court and judges can take no action until they do.

All capital convictions ... cally appealed by law to the state Supreme Court for review.

Lawyer Robert Harper of Tallahassee is handling Bundy's appeal from his convictions for the Chi Omega murders. Harper's brief was due in September 1981, but still has not been filed.

Harper said he has hired two assistants to help him work on the 80-page document, which outlines the main points on which the appeal is based.

"We're going to finish the brief and file it March 31," Harper said, "but the case record is huge."

The appeal from Bundy's conviction for the Chi Omega murders, he said, will center on three "landmarks" in the trial:

✔ Hypnotic refreshing of witnesses' testimony.

✔ Evidence of bite marks, later linked to Bundy's teeth. The prosecution compared bite marks on one of the Chi Omega victim's buttocks with casts made from Bundy's teeth.

✔ Pre-trial and in-trial publicity.

Harper was reluctant to discuss the appeal in detail before it goes to court, but he indicated that the bite-mark evidence used in the trial would be a major focus of his attack.

Hypnosis has often been used in recent years to refresh the memories of witnesses before testimony in court.

(Please see BUNDY, page 3B)

Bundy—

(Continued from page 1B)

But such "improved" testimony can be attacked in several ways.

Harper declined to elaborate.

Intense in-trial publicity — including live television coverage — could have affected the performance of defense lawyers, Harper said, even though the jury was sequestered. Such publicity will be important in his appeal, Harper said.

Once Harper files his defense brief, the prosecution has 30 days in which to file its answering brief. Only after that is filed will the high court schedule oral arguments at which attorneys may argue their cases in detail and answer questions raised by the justices.

Harper said assistant Florida Attorney General David Gauldin, who is handling the state's case on appeal, has concurred in Harper's requests for delay.

"He's going to need extra time, too," Harper said. "We're dealing with 12,000 pages of transcript."

Harper said he did not think the recent indictment of a pre-trial prosecution witness, Milton Kline, would have any significant effect on the appeal of the Chi Omega convictions.

Kline, a New York hypnotist who testified in pre-trial proceedings about the effects of hypnotism on testimony, faces trial for perjury in Florida.

Orlando state attorney Robert Egan has charged him with falsely claiming that he had a master's degree in medical psychology from Columbia University, a doctorate in clinical psychology from Pennsylvania State University and postdoctoral training in several fields.

Live Oak state attorney Jerry Blair, who prosecuted Bundy for the murder of Lake City school girl Kimberly Leach, has asked Gov. Bob Graham to appoint a special prosecutor for Kline.

Blair said he might be called as a witness in the case.

Another prosecution witness, Dr. Raymond LaScola, of Los Angeles, has been charged with killing a woman in California a few months after he testified in the trial.

But Africano, Bundy's defense attorney in the Leach case, also said he didn't think the Kline prosecution would affect an appeal. Africano noted that Kline didn't testify in the trial — only at a pre-trial hearing.

5/20/82

State mocks Bundy's Supreme Court appeal

UNITED PRESS INTERNATIONAL

With unusual sarcasm, the state yesterday dismissed mass murderer Theodore Bundy's lengthy appeal of his death sentence as being full of legal "gotcha!" manuevers and "head I win, tails you lose" arguments.

To answer all of the issues raised by Bundy in his 123-page appeal filed March 31, the attorney general's office had to ask the Florida Supreme Court to waive the normal 50-page limit on reply briefs.

"What petitioner was constitutionally entitled to was a fair trial," Assistant Attorney General David Gauldin wrote in the 108-page reply. "That he got."

Bundy, 35, was convicted in July 1979 of the murders 18 months earlier of Lisa Levy, 20, and Margaret Bowman, 21, in their Chi Omego sorority house at Florida State University.

In his appeal, Bundy claimed that publicity prevented him from getting a fair trial yet also objected that his trial was moved from Tallahassee to Miami. He also challenged the admissibility of bitemark identification.

The state provided answers to each point but reserved its most bitter language for Bundy's claim that he received inadequate counsel.

Gauldin wrote that Bundy had a "defensive army" at his service including seven lawyers, an identification expert, a

Turn to SARCASM, page 8



Florida Flambeau/Bob O'Lary

***Ted Bundy laughs** during pre-trial deliberations in Tallahassee in 1979*

Sarcasm *from page 1*

jury selection specialist and dental identification experts "Who had more degrees than a thermometer."

The state moved that Bundy, a one time law student, also insisted on acting as his own attorney and relegated the other lawyers to "captains and privates, depending upon the appellant's moods."

"There can be little doubt that the appellant was an intransigent client and an intolerable commander," Gauldin wrote.

The state said the judge took "Extraordinary precautions" to ensure publicity did not influence jurors and noted that the defense itself requested the trial be transferred to Miami.

A claim by Bundy that he was given a lawyer belatedly while under investigation by a grand jury and, if not, then the lawyer he was given was ineffective amounted to "heads I win, tails you lose argument," the state said.

Similarly, Bundy's criticism of the trial judge for not giving a jury instruction he requested in view of the Bundy's agreement to another instruction amounted to a "Gotcha" manuever designed to void the trial, Gauldin said.

The state acknowledged that Florida courts have yet to rule on the admissibility of bitemark evidence but noted that many other states allow it and Florida allows similar scientific techniques, such as hair analysis.

Two forensic dentists — odontologists — testified for the state that bitemarks on the victims were compatible with Bundy's teeth.

"Here, the scientific evidence was reliable enough to be admitted under any standard. Coupled with the other circumstantial evidence against the appelant, the appelant's guilt was proved beyond and to the exclusion of a reasonable doubt," Gauldin argued.

Besides the Chi Omega murders, Bundy was later found guilty of killing a 12-year-old Lake City girl, was charged with the murder of a woman in Michigan and was named a suspect in at least a dozen other murders around the nation.

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JUSTICES WILL HEAR BUNDY APPEAL SOON

Theodore Bundy's appeal of his conviction and death sentence for the murder of 12-year-old girl will be heard April 8 by the Florida Supreme Court.

The oral arguments arguments are the last legal step in the appeals process. The justices probably won't rule in the case for several months.

Bundy, a 36-year-old former law student, was convicted in Orlando of kidnaping and murdering Kimberly Diane Leach, a student at Lake City Junior High School. He was condemned Feb. 9, 1980, and is awaiting the outcome of his appeal on Death Row at Florida State Prison near*Starke.*

Bundy's lawyer, J. Victor Africano, argued in a brief filed with the court that Bundy should receive a new trial because excessive pretrial publicity created "a Bundy mystique" that made a fair trial impossible.

Bundy was also convicted in 1979 in Miami of killing Lisa Levy, 20, and Margaret Bowman, 21, at the Chi Omega sorority house at Florida State University in Tallahassee on Jan. 15. 1978. Bundy also was convicted of attacking three other women, two at the Chi Omega house, the same night. They lived.

ADDED TERMS:

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